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T H E

C A S E S

O F T H E

APPELLANTS *and* RESPONDENTS

I N T H E C A U S E O F

**Literary Property,**

B E F O R E T H E

H O U S E O F L O R D S :

W H E R E I N

The Decree of Lord Chancellor Apsley was  
reversed, 26 Feb. 1774.

W I T H

The genuine ARGUMENTS of the COUNCIL, the OPINIONS of the JUDGES,  
and the SPEECHES of the LORDS, who distinguished themselves on that Occasion.

With NOTES, OBSERVATIONS, and REFERENCES.

By a GENTLEMAN of the INNER TEMPLE.

L O N D O N :

Printed for J. BEW, Pater-noster-Row; W. CLARKE, opposite Lincoln's Inn Gate, Lincoln's Inn  
Fields; P. BRETT, opposite St. Clement's Church, in the Strand; and  
C. WILKIN, Orange-Street, Red-Lion-Square.  
M.DCC.LXXIV.



THE

CHURCH

OF THE

APPELLANTS' RESIDENCE

IN THE CASE OF

THE CHURCH

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# P R E F A C E.

**T**HE shrewd Remark of the School Boy, on his being reprimanded for stealing the Old Woman's Gingerbread *Letters*, viz. *that he understood, that the supreme Judicature of Great Britain had lately determined that lettered Property was common*; though related of a School Boy, would not, in my Opinion, disgrace the first Abilities; for it is observable, that there is no such Epithet as *literary*, in the *English* Language, but *lettered* is to be found, and is always used in the Sense, and applied for the Purpose of expressing the self same Meaning, the Schoolboy wished to convey, when he made the above Observation. So that *lettered Property*, and not *literary Property*, seems to be the Subject Matter of the following Sheets.

I presume the Reader will require no Apology for this Publication, as the following Arguments, Opinions, and Speeches, are confessedly the most interesting and able that have been delivered either in the House of Lords, or in *Westminster* Hall, since the Statute of *Queen Anne*. Their Subject is of special Concernment to the Gentlemen of the Profession, and to all those who are any ways concerned in *lettered* Productions, or desirous of reading some of the best Arguments, Opinions, and Speeches, delivered by the greatest Men, the first Lawyers and Statesmen in this Country, on the Definition of a most difficult and important Question.

The Reader will find an incredible Fund of Learning and Knowledge; and among other interesting and able Disquisitions, the following ones are most learnedly debated, viz. the History of the Statute of the 8th of *Queen Anne*; the History of Injunctions, relative to *lettered* Property; the  
a general



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general Rules of Law for the Construction of the legal Sense of the Term private Property; which is also defined philosophically, and considered in the separate Lights of being corporeal and spiritual; the Nature of Patents, Privileges, and Grants of the Crown are minutely entered into; and these several Inquiries are embellished with great (1) Elegance and Force of Language, and illustrated with many apposite and judicious Observations.

This Decision of the Lords hath very considerably shaken the Law (2) Patent, and reduced its *exclusive* Right to print, within the *inclusive* Compass of a Nut-shell; much to the Honor and Interests of the Profession; the Works of (3) *Shakespeare*, of *Addison*, *Pope*, *Swift*, *Gay*, and many other excellent Authors of the present Century, are, by this Reversal, declared to be the Property of any Person, who chuses to be at the Expence of Paper and Print.

It would have been tedious and tautologous, to have repeated the Arguments of the Council, or the Cases and Authorities cited by them, as they are all of them so very fully and amply set forth, and so elaborately expatiated upon, canvassed, and discussed, not only by the Appellants, in their printed Case; but also by the Judges in their Opinions; together with the Reasons, whereon they were founded.

We have made several Extracts from *Catharine Macaulay's* "Modest Plea for Copy Right;" and also transcribed Lord *Kames's* (4) sensible Opinion, on the Statute of the 8th of *Queen Anne*.

(1) It seems almost unnecessary to intimate to the Reader, that we, in the above Observation, particularly allude to Lord *Camden's* Speech.

(2) See Baron *Eyre's* Opinion, Fol. 34. Lord *Camden's* Speech, Fol. 50.

(3) *Id.* 34.

(4) See End of Appendix.

Lord



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Lord *Camden's* Speech is elegant and forcible, in respect to Language; and contains the soundest Doctrine with respect to Law, Equity, and Justice.

The Opinion of Mr. Baron *Eyre* is delivered with the Erudition of a Scholar, the Acuteness of an able Lawyer, and the Accuracy of a sound Reasoner.

Though Lord *Mansfield* declined speaking to the Question in the House, and though Mr. Justice *Yates* had not an Opportunity of delivering his Opinion there; yet as the former hath, been pleased to signify his Sentiments elsewhere, and the latter too, on the same Question, and as they differed in Opinion we wish to mention them both on this Occasion.

Sir *James* (5) *Burrow* observes, "that except in this Case of *lettered Property*, and of *Perrin v. Blake*, then (6) depending by Writ of Error, in the House of Lords, wherein Mr. Justice *Yates* differed with the other three Judges, every Rule, Order, Judgment, and Opinion had, been (as far as Sir *James* could recollect) unanimous."

Sir *James* (5) also observes, that such Unanimity "gives Weight and Dispatch to the Decisions, Certainty to the Law, and infinite Satisfaction to the Suitors."

And we, in our Turn, beg Leave to observe, that the two only Cases, wherein the Judges of the Court of *King's Bench* differed in Opinion, have both since been determined agreeable to the Opinion of the dissenting Judge, the late Mr. Justice *Yates*; and we beg Leave also to observe further, that

(5) *Bur. Lit. Prop.* 112.

(6) However singular the Opinion of Judge *Yates* was in the Court of *King's Bench*, it afterwards appeared, that the Majority of the Judges in the *Exchequer Chamber*, were influenced by his strict Attachment to established Rules of Law; and accordingly reversed that unprecedented Decision of the Court of *King's Bench*, and thereby restored the venerable Train of preceding uniform Judgments, upon the same Point, to its former Authority.



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the Court of *King's Bench*, in their Judgment in *Perrin v. Blake*, in a liberal Spirit soared above *nugatory* Refinements, and *senseless* Distinctions, arising from *the strict Letter of the Law*; and laughed at those Restrictions, by which a Court of Equity esteems itself bounden; and that Judge *Yates*, from an *illiberal* Habit of Attachment to established Laws, was of a direct contrary Opinion; but his *antiquated* Arguments were easily answered, by the Court's observing, that there were Lawyers of a different *Bent of Genius* and *Mode of Education* (from that Part of the Bench, which concurred in the Judgment) who chose to adhere to *the strict Letter of the Law*.

Perhaps, when these special Circumstances, attending this Difference of Opinion, are maturely considered, the boasted Unanimity of the Court of *King's Bench*, may not have always been happy in its Consequences to the Suitors of *that* Court.

In reporting the Arguments of the Council, I have not scrupulously followed the Style and Method of the Speaker; I hope, however, the Reader will do me the Justice to believe, that the *Substance* of what was delivered, is faithfully reported; but oftentimes in my own Words; Every Defect therefore in Point of Method or Expression, which the Reader meets with, I alone am answerable for; though I flatter myself the learned Gentlemen, whose Sentiments I have thus delivered, will not often find themselves or their Characters, greatly wronged in that Respect.

I do most humbly beg Pardon of the Lords and the Judges, for innumerable Injuries I must have done them, as to *Language* and Argument. I did not take my Notes in short Hand; I watched the *Sense*, rather than the *Words*; and therefore may often use some of my own: not being blessed with the quickest natural Parts, I may have misapprehended  
Topics



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Topics and Allusions; I may have made Blunders in the Sense, by endeavouring to rectify those of my Pen; these are Imperfections which Diligence could not cure. I am only concerned, lest my Errors should be imputed, not to myself, but to those able and illustrious Lords and Judges, whose Discourses, I may happen (through my own Infirmities) to have misrepresented.

As the same Arguments were used, and the same Grounds gone on, in this Appeal, as in the Cause of *Millar v. Taylor*, we beg Leave to recommend to the Reader, an attentive Perusal of "The Question concerning *literary Property*, published by Sir *James Burrow*, in Quarto, A. D. 1773," wherein he will find the separate Opinions of the four Judges; and the Reasons given by each, in Support of his Opinion. The very able Argument of *Arthur Murphy*, Esq; who was Council for the Defendant in the said Cause, is also most worthy of Perusal; which Argument he delivered in the Court of *King's Bench*, 7 June 1768. And as this same Question hath undergone the Investigation of the Lords of Session, in *Scotland*, in the Cause of *Hinton v. Donaldson & al.* we wish the Reader to peruse the able and judicious Arguments and Opinions, delivered by the Council and Lords, in that Kingdom, on that Occasion; which are all to be found, and well taken, by *James Boswell*, Esq; one of the Council in the Cause; they were published in *London* and *Edinburgh*, in Quarto, in the Year 1774.

The ingenious Argument of *Francis Hargrave*, Esq; one of the Council for the Defendants in *Chancery*, in the Cause of *Becket & al. v. Donaldson* and another, and which Mr. *Hargrave* favoured the Public with in Print, not having an Opportunity  
of



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of delivering it in the *proper* and *regular* Manner, which well deserves the Notice of the curious Reader.

To conclude. Mrs. *Macaulay* observes, that "if some positive Law does not lend its Aid to the Support of the tottering State of Literature in this Country, this Decision will be a more mortal Stab to the Freedom, Virtue, Religion, and Morals of the People of *England*, than the unthinking Multitude in general at present apprehend." *Quere.*

# C O N T E N T S.

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# E R R A T A.

Page 20, for *our*, read *one*. Page 28, for *Vac.* read *Term*. Page 36, for *in like Manner as*, read *and was of the same Opinion with*. Page 41, for *sine*, read *sine*.



# Literary Property.

## HOUSE of LORDS.

Alexander Donaldson, and  
John Donaldson, *Booksellers*, — — — } Appellants.

Thomas Becket, Peter Abraham de Hondt, John  
Rivington, William Johnston, William Strahan,  
Thomas Longman, William Richardson, John  
Richardson, Thomas Lowndes, Thomas Caslon, } Respondents.  
George Kearsley, Henry Baldwin, William  
Owen, Thomas Davies, and Thomas Cadell,  
*Printers and Booksellers*, — — — }

## CASE of the APPELLANTS.

ON the 21st of January, 1771, the Respondents filed their Bill in the High Court of Chancery, and, among other Things, charged, that one JAMES THOMPSON was the Author of a Tragedy called SOPHONISBA, and of a Poem entitled SPRING.

And that, on or about the 16th Day of January, 1729, He, the said JAMES THOMPSON, by Indenture, bargained and sold true Copies of the said Works to one ANDREW MILLAR, together with the sole and exclusive Right of printing the same, for the Sum of £137: 10.

That the said JAMES THOMPSON was also the Author of other Poems, entitled SUMMER, AUTUMN, WINTER, BRITANNIA, a Poem sacred to the Memory of Sir ISAAC NEWTON, an Hymn on the Succession of the SEASONS, and an Essay on DESCRIPTIVE POETRY.

And that on the 28th Day of July, 1729, He, the said JAMES THOMPSON, bargained and sold the several Copies of the last mentioned Poems to one JOHN MILLAN, together with the sole Right of printing the same, for £105.

The Respondents further charged, that, by Indenture, bearing Date the 16th of June, 1738, JOHN MILLAN sold to ANDREW MILLAR the Copies of the last mentioned Poems, and the Right and Property of printing, publishing, and vending the same, for the Sum of £105.

That ANDREW MILLAR departed this Life in June, 1768, leaving JANE MILLAR, (now JANE GRANT) WILLIAM MILLAR, and the Plaintiffs, THOMAS LONGMAN and THOMAS CADELL, his Executors.

A

That



13th June, 1769,  
Millar's Representatives  
sold same by Auction to  
the Respondents.

Charge that Appel-  
lants sold without Li-  
cence from the Re-  
spondents.

Charge that Appel-  
lants refuse to render  
an Account.

Prayer of the Bill.

The Answer of the  
Appellants.  
28 Years Monopoly by  
8th Anne, Chap. 19,  
had elapsed.  
Deny exclusive Right  
claimed by Respondents.

Appellants admit Pub-  
lication of the Poems,

Death of Millar, and  
the Charges in the Bill.

That on the 13th of June, 1769, the several Copies above mentioned, with the sole Right of printing and publishing the same, were sold at the *Queen's-Arms Tavern*, in *St. Paul's Church-Yard*, and that the Plaintiffs, in certain Proportions, were the Purchasers at and for the Sum of £505.

The Respondents then proceeded to charge, that the Appellants, notwithstanding the Premises, and without the Licence and Consent of the Respondents, published and sold several Copies of the above mentioned Poems, called *THE SEASONS*, and the said *HYMN* on the Succession of the Seasons, each Copy being bound up in a single Volume, and entitled, *The SEASONS*, by *James Thompson*; *Edinburgh*, printed by *A. Donaldson*, 1768, thereby deriving to themselves great Gain, to the Detriment of the Respondents, who claimed to themselves the whole Profit arising from the Publication and Sale of the same.

And the Respondents further charged, that the Appellants had not at any Time purchased from the said *JAMES THOMPSON* the Right of printing and publishing the said Poems; but insisted, notwithstanding, upon the Liberty of selling the same, without accounting to the Respondents for the Price thereof.

The Respondents, therefore, prayed that the Appellants might come to an Account with the Respondents, for all the Money by them received by Sale of the Poems, and pay the same to the Respondents, and should for the future be restrained, by an Injunction, from publishing and vending any Copies of the said Poem, called the *SEASONS*, and the *HYMN*.

To this BILL, the Appellants put in their Answer, sworn the 16th of July, 1771, and thereby admitted, that the said *THOMPSON* was the Author of the Poems, called the *SEASONS*, and the *HYMN*: But, forasmuch as twenty eight Years (the longest Period allowed by the Statute of *Queen Anne*, for the Monopoly of any new Work) had elapsed since the first Publication, and before the Appellants had printed or sold the same, they denied (and think themselves still warranted to deny) that the Respondents had, or could then have the sole Privilege of printing and uttering the *SEASONS* and the *HYMN*: And they admit the Publication and Sale of the said Poems, as charged by the Bill.

They admit also the Death of *ANDREW MILLAR*, and the Purchase made by the Respondents at the *Queen's-Arms Tavern*.

On the Part of the Respondents, several Witnesses were examined, and the said *JOHN MILLAR* deposed, that *THOMPSON* was the Author of the second Parcel of Poems in the Bill mentioned, and wrote great Part of the same at his House. That they were afterwards assigned to him by *THOMPSON*, and that he conveyed all his Right therein to *ANDREW MILLAR*.

Upon this State of the Case, it is observable that the Respondents derive a Title through Executors, *eo Nomine*; and not by Means of any specific Device to them. From this it is conjectured, that they mean to claim some *Chattel* or other, and to complain of a Wrong done to that Species of Property.

Of Chattels it is certain, that they all go absolutely to Executors, together with all the Rights, which can exist in them. The Case is the same of Rights purely incorporeal, which lie only in Action, and are independent of any Subject real or personal, if they are for Terms of Years, as an Annuity, a Franchise, or a Privilege, (such as Monopolies, &c.) for a limited Time. But it is conceived, that a perpetual Annuity, Franchise, or Privilege, must be a Fee Simple, and descend to Heirs. If this be so, the main Difficulty will then consist in ascertaining the *Chattel* claimed by the Respondents, and how and in what Manner the Wrong complained of applies to it.

The Bill was penned with extreme Caution by the Respondents, solicitous, as it should seem, to avoid entangling themselves in a Variety of Circumstances, which yet make Part of the SPECIAL VERDICT in the Cause of *MILLAR* and *TAYLOR*; and, in the (1) Report of Sir *James Burrow*, are stated to be highly material, although in support of that Opinion no Reason is alledged. It may, therefore, be inferred, that the present Attempt is an Experiment to try how far the Doctrines of that Case may be extended beyond the Case itself. What was done with the Poems in Question, between the Time of their being first written and the 16th of January, or the 28th of July, 1729, (when the Copies were sold) does not appear in any

(1) See Fol. 9, 10, 126. of this Report, published in 4to under the Title of "The Question concerning Literary Property," in the Cause of *Millar v. Taylor*; by Sir *James Burrow*, Knight. A. D. 1773.



Part of these Proceedings. The Respondents have not thought fit, in Support of their Claim, to alledge that the Author had neither published, sold, nor given *true Copies* of them, to other Persons before those particular Days; indeed, such an Allegation could not have been made with Truth, because it is notorious that they were published at separate and distinct Times, as they happened to be written. The Seasons, in particular, were found by the special Verdict, in the Cause of *Millar and Taylor*, to have been published in the Year 1727, at several Times between the Beginning of the Year 1727, and the End of the Year 1729, and of Course many *true Copies* of them were sold to various Persons, before the Purchases by *Andrew Millar* and *John Millan* supposed by the Bill. But it is immaterial to the present Claim, in what Manner, or with what View the Author published originally, since if any Property adhered to him, after and notwithstanding the first Publication, the same, without any Manner of Doubt, was disposible by him at his pleasure.

Upon the same Principle, the Respondents have industriously declined to charge, (2) that the said *James Thompson* was a natural born Subject, or resident in that Part of Great Britain, called England; or that the Poems in Question were first printed and published in the City of London, the same having never before been published elsewhere; meaning, apparently, to insist that the Right which they claim, being derived from Property, cannot depend for its Existence on such Accidents: And that, therefore, this Case has to do with that of Foreign Books, which do not, in their Apprehension, stand on a different Footing from Copies printed and published in the City of London (3).

The Respondents have, for the above-mentioned Reasons, declined to charge (if the Truth be so) that the Work now in Question was (4) upon the said Purchases of the several Parts thereof, by the said *ANDREW MILLAR* and *JOHN MILLAN*, respectively, and before the Publication thereof, duly entered in the Register of the Company of Stationers of the City of London, as the whole and sole Property of the said *Andrew Millar* and *John Millan*; to avoid the Appearance of Recourse to a STATUTE, made in their Favour, but now under the ill Luck of being thought an Impediment. The Respondents, by the Omission of the above Circumstances, intend, no doubt, for Reasons sufficiently obvious, (if the Foundation of their Argument were found) that the Species of Right, to which they set up their Claim, is not liable to a Supposition that the Author has relinquished the Copy, and consequently given a general Licence to print (5).

They deny that (5) many of the best Books fall under that Description, and that a very little Evidence might be sufficient, after the Author's Death, to imply such a tacit Consent; as if the Book had not been ENTERED before Publication that it would be a Circumstance to be submitted to a Jury, "That the Copy was intended to be left open." In Fact, Mr. Thompson, their Author, died in 1748, and they disregard the Rest of the Inference. Besides, if they had admitted the Circumstance above stated to be material to themselves, it would have been equally so to the Author, who likewise omitted to enter his Poems in the Stationers' Register.

For the same Reason, they have not pretended (2) that, from the Time of the said two several Purchases, *ANDREW MILLAR* and *JOHN MILLAN*, and the Executors of the former, and their Assigns, have printed and sold the said Works as their Property, and now have, and constantly have had a sufficient Number of Books exposed to Sale at a reasonable Price. To their unbounded Claim of Property, it is certainly repugnant, that the Owner should be obliged to part with it at any Price, but that which he sets himself. Nor will they admit (5) that their Relief may be rebutted by shewing that they mean to enhance the Price; which is against Law. There is certainly no Law against it. The Statutes of (6) *Richard the Third*, and (7) *Henry the Eighth*, relate to the Importation of Books from Foreign Parts, and extend no Care to Property or Privilege: And the Price of Books has nothing to do with *Ingrossing*, *Forestalling*, *Regrating*, or any other Offences against the Police of a public Market.

The Respondents have likewise forborne to charge, that, (2) before the Reign of Queen

(2) See the special Verdict, in *Millar v. Taylor*. id. Fol. 5.

(3) Id. Fol. 9.

(4) See Special Verdict. Id. Fol. 8.

(5) Id. Fol. 10.

(6) 1 Ric. III. Chap. 9. Sect. 12.

(7) 25 Hen. VIII. Chap. 15. whereby 1 Ric. III. Chap. 9. Sect. 12. is repealed.



*Anne*, it was usual to purchase from Authors the perpetual Copy-right of their Books, and to assign the same from Hand to Hand for valuable Considerations, and to make the same subject to Family Settlements for the Provision of Wives and Children: perhaps as judging, that if such a Property had always existed at Common Law, the Purposes to which it hath been applied, would be perfectly immaterial, and, if it did not exist, the Application of it to Family Interests would not be a sufficient Ground, to build up a new and unheard-of Property; perhaps conceiving, that what was done among others would not be received as Evidence in the Court of Chancery; perhaps convinced that no such Usage could be proved, or that such Usage, if stated in all its Circumstances, would be seen advantageous to Booksellers only, and not to Authors, and upon the Whole might turn out just so much of nothing to their Purpose.

(1) They have likewise avoided to charge any supposed BYE-LAWS of the Stationers Company, perhaps aware, that such BYE-LAWS would imply a special Right created by themselves, and extending only to their own Members; perhaps, considering that the Appellants (not being Members of that Company) would not be affected by such BYE-LAWS, even to the extent of making them competent Evidence: Perhaps, apprehending that such BYE-LAWS would throw a Light upon the imaginary Usage above mentioned, and by revealing the Origin, Nature and Extent of the Property contended for, point the Force of it against their own Argument.

The Question, therefore, before the Court of Chancery, stood in this simple Form: Whether the Author, having sold and delivered, for a competent Price, ONE or FIVE HUNDRED TRUE COPIES of his Work, retains in each of the Copies so sold and delivered (by the true Construction of such Contract) the mere and absolute Dominion and Property, conveying to the Vendee no more than a special and limited Use thereof; or *à converso*, whether such Vendee, or rather Baillée, acquires (by the true Construction of the Contract of Sale and Delivery) no absolute Property to himself, but only a Right of using, to a certain Extent, the Property of another?

If this Proposition be maintainable by the Respondents, the Consequence insisted upon is, that in respect of the Property so retained, the mere and absolute Owner, viz. THE PERSON WHO HAS SOLD, may maintain an Action for the exclusive Use of it by the Baillée, viz. the BUYER.

To avoid the difficulty of making out the whole of this Idea, some have taken Part of it, and they divide it thus.

Every Book, they say, consists of Two distinct Parts, the material Part, namely, the Paper, Print, and Binding, which is a Manufacture; and the immaterial Part, namely, the Doctrine contained in it, which is the Facture of the Mind. The Property in the material Part passes according to the Law in all other Cases; but the Property in the immaterial Part remains to the Author, which is about as intelligible, as if one should state JOHN to be the Owner of the CARCASE and LIMBS of the Horse, and THOMAS the Owner of his Colour, his Shape, Speed and Mettle.

This seems to have led to an elaborate Discussion of the Principles of Property; whether it could exist in an Idea for want of Substance, Physical Locality, distinguishing Marks, and many other Enquiries of the same Abstract Nature. A mere *scio-machia*, wherein, by no uncommon Accident, the Absurdity of the Position made a serious Answer seem ridiculous.

Some have stated the Property to exist in the Profits of Sale, which (as they assume for the Purpose) belong to the original Author. But this is only substituting another, and as it seems, a less proper Phrase in the place of the Word MONOPOLY, which, to use the Words of *Brook*, is Property not properly known. The Privilege, however, of Monopoly is an Interest or Estate well known to the Law. It only remains to shew what Title the Author has to it.

(2) Some have contented themselves with declaiming upon the Moral Fitness, the Reasonableness, the Justice, and Public Conveniency of putting into the Hands of an AUTHOR the Means of raising upon the World, for his own Profit, the utmost Sum of Money for the Use

(1) See *Bur. Lit. Prop.* 5, 6, 7.

(2) See *Mrs. Macaulay's "Modest Plea for the Property of Copy-right."* 4th A. D. 1774.



## A P P E E L L A N T S.

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of his Book, and this can only be done by giving him a MONOPOLY. Now, if the Truth of all this were admissible and clear, it would prove, *at most*, that it OUGHT to be done, NOT that it *has been* done; and that those, who alone *can* do it, ought to consider and pronounce upon it. But, in fact, *they* have considered of it, and pronounced upon it otherwise.

Some contend, that such a Monopoly is already established by Law, and appeal to Usage for the Proof of it: But the Usage adduced is incompetent, for want of Time beyond Memory, and, in Truth, does not exist, as appears abundantly by the Instances produced to prove it.

Some draw their Proof of the Common Law from the INJUNCTIONS granted by the Court of Chancery, admitting (or rather insisting) that such INJUNCTIONS ought to be granted, ONLY where the Common Law is known and clear; admitting also, that the Case is NEW to the Common Law, and was therefore properly sent thither by the Court of Chancery. After which, it will not be wonderful if Injunctions, granted in a COURT of EQUITY, should not be thought an indisputable Proof of the Common Law.

On the 16th of November 1772, the Cause came on to be heard in the high Court of Chancery, when the Court was pleased to decree, that the Injunction, which had been granted, *pendente Lite*, to restrain the Appellants from publishing any more Copy or Copies of the several Poems or Hymn, or any of them, should be made perpetual, "and that it be referred to a Master in Chancery to take an Account of what had been received by the Appellants, or either of them, or by any other Person, by their or either of their Order, or for their or either of their Use, by, from, or on Account of publishing and selling of the Poems in the Pleadings mentioned, and that the Appellants should pay to the Respondents, what should be found due from them on the Ballance of the said Account, and reserve the Consideration of Costs until after the Master should have made his Report." 16th Nov. 1772. Decree.

The Appellants, apprehending themselves to be aggrieved by this Decree, have appealed from it, and humbly hope that it will be reversed, for the following, among other

## R E A S O N S.

I. The Object contended for by the Respondents, is of so abstruse and chimerical a Nature, that it is hardly capable of being defined. It is sometimes called PROPERTY, and for the Sake of Distinction, LITERARY PROPERTY. The Word PROPERTY has various Significations. In a Philosophical Sense, the Qualities, inherent in any Subject or Thing, are called its PROPERTIES. In a Civil Sense, PROPERTY is CORPOREAL or INCORPOREAL. CORPOREAL PROPERTY is the actual Possession of some Substance, with the Power of enjoying and disposing of it. The Object now contended for is not CORPOREAL PROPERTY. INCORPOREAL PROPERTY is of two Sorts; First, it is a Right relating to some Substance, as a Right to take the Profits of Land, without having the Possession of the Land, or a Title to it. 2dly, It is a right to exercise some Faculty, or to do some particular Thing for Profit. The Perception of the Profits, is a taking of some Substance, or CORPOREAL PROPERTY; and hence the *incorporeal Right* is metaphorically called PROPERTY. The Word, thus used, becomes equivocal, importing alternately the *Right* and the Profits resulting from the *Right*. In like manner *Land* and the *Right* to it, are both called PROPERTY. If the Object of the Respondents be an *incorporeal Right*, it is a mere Right to do some particular Thing for Profit. The Thing to be done is the *multiplying of Copies of Books*. The SOLE RIGHT of *multiplying Copies*, is a *sole Right* to exercise a *natural Faculty*, and this, it is obvious, is an EXTRAORDINARY PRIVILEGE. A sole Right to take the Profits arising from the Exercise of a *natural Faculty*, is a MONOPOLY in itself very extraordinary. This PRIVILEGE and this MONOPOLY, the Respondents chuse to call their *Property*, and they are to maintain their

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Title



Title to it at *Common Law*. But by that Law, it is submitted, on the Part of the Appellants, that the PRIVILEGE and MONOPOLY never did, and never can exist.

II. A Right at Common Law must be founded upon Principles of CONSCIENCE and NATURAL JUSTICE. CONSCIENCE and NATURAL JUSTICE are not local or municipal. NATURAL JUSTICE is the same at Athens, at Rome, in France, Spain, and Italy. Copies of Books have existed in all Ages, and they have been multiplied; and yet an *exclusive Privilege*, or the *sole Right* of ONE MAN to multiply Copies, was never dictated by NATURAL JUSTICE in any Age or Country, and of course the *sole Liberty* of vending Copies could not exist of *common Right*, which gives an equal Benefit to all.

III. An EXCLUSIVE PRIVILEGE to exercise a *natural Faculty* is an Encroachment upon the Rights of Man. A NATURAL FACULTY differs from the Execution of an OFFICE. An OFFICE is the Work of civil Policy, and being of *positive Institution*, may be granted to ONE, without Injury to the Rest: But when that, which of *common Right* should be free to all, becomes confined to any ONE MAN, or any BODY OF MEN, the rest of the Community suffer an Abridgement of their natural Liberty. But such a Restraint of the LIBERTY of MANY, for the Sake of ONE, was never established by NATURAL JUSTICE. If it ever has existed, it has been the *Creature* of the CIVIL MAGISTRATE upon Principles of Policy; but the Respondents disclaim the Aid of the LEGISLATURE upon the present Question, and derive their Claim from the COMMON LAW.

IV. The Common Law has ever regarded *public Utility*, the MOTHER of Justice and of Equity. *Public Utility* requires that the Productions of the Mind should be diffused as wide as possible, and therefore the *Common Law* could not, upon any Principles consistent with itself, abridge the Right of multiplying Copies. When the *Common Law* took Root in this Kingdom, Literary Composition stood, in regard to the Manner of making it public, upon the same Footing as in Greece or Rome. WRITING was, in those States, the *only Method* of multiplying Copies. To transcribe or copy out a Book was the Right of every Individual; there was no other Way of propagating Knowledge: Of a perpetual Right in ONE MAN to write out Books or to make Copies, there is not a single Trace in any Author that has come down from Antiquity. ATTICUS retained a Number of Slaves trained up to Writing, and it appears in TULLY's Epistles, that ATTICUS transcribed, not only for his own Use, but to sell again to CICERO.

In like Manner the natural Liberty of transcribing Books was never checked by the Common Law. From AMES, and other Compilers of the History of Letters, we learn, that, from the slow Progress of *transcribing*, Books were held up at an enormous Price. *Livy* was sold for 120 Crowns of Gold for each Book, and a French Romance, called "*Le Romans de la Rose*," was sold for 33l. 6s. 6d. The Common Law could not with Justice uphold a Price so prejudicial to the Cause of Learning. Accordingly he, who possessed a BRACTON or a CHAUCER, had an undoubted Right to make as many *true Copies* as he pleased. A MONOPOLY would have been pernicious, and Learning, in Consequence, must have gone to Ruin.

V. The *Common Law* is IMMEMORIAL USAGE. If, therefore, THERE WAS A TIME, when the PRIVILEGE and MONOPOLY, now contended for, could not, and in Fact did not exist at *Common Law*, they never can exist by *that Law*. But SUCH A TIME has been, namely, from the Beginning of our History down to the GREAT ÆRA of Printing; and Printing (which is *only* a more expeditious Method of multiplying Copies) it is contended, could not change the Principles of Right and Wrong, or innovate the Law.

Printing was invented at Mentz in Germany, Anno 1458.

In 1471 CAXTON, a Mercer, of London, brought the Art into this Kingdom. In Acts of Parliament it is called a *Trade*, or *Manufacture of the Kingdom*. To exercise the Art was the Right of the Subject; in this Light the first Printers considered it. CHAUCER's Works were printed by CAXTON 1498, when the Author had long been dead. Another Edition of *Chaucer* was soon given by Thomas Godfrey. Littleton's Tenures were printed



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printed 1481, by John Lettoun, and in a short Period, by Richard Pinson 1526, by Thomas Berthelet 1330, by Willam Rastall 1534, by Robert Redman 1540. Pinson, indeed, says, in the Wit of that Age, that Redman should be called *Rudeman*, *quia Hominem rudiores vix invenias*. He abuses Redman's Edition, but not a Word about an Invasion of Property.

*Objection.* It is said on the Part of the Respondents, that the Name "*Copy of a Book*," has been a Term for Ages, to signify the sole Right of printing, publishing, and selling, and that this Species of Property has existed in Usage as long as the Name.

*Answer.* It is admitted on the Part of the Respondents, that there is no Bye-Law or Ordinance relative to Copies till after the Year 1640. The Usage, whatever it be, is therefore not immemorial.

*Objection.* From the Erection of the Stationers Company, Copies were entered as Property, and Pirating was punished.

*Answer.* The Common Law, according to this, begins with the Stationers Company. The first Charter was 1556, 3 & 4 Phil. and Mar. The Grant was founded on Principles of Bigotry, to prevent, as it recites, the Renewal of great and detestable Heresies. The new Members of the Company (in Number 97) were made literary Constables to search for Books, &c. and, though the Crown had no Right over the Trade of Printing, it was ordered, "That no Man should exercise the Mystery of Printing, unless he be of the Stationers Company, or have a Licence."

To this Company so constituted, and thus armed with a GENERAL WARRANT, we are referred for Evidence of the Common Law.

*Objection.* Anno 1558, the Charter was confirmed in the 1st of Elizabeth. In that Year there are Entries of Copies to particular Persons, and down from that Time.

*Answer.* Patent Rights began soon after the first Introduction of Printing. FROISSART's *Chronicles of England, France, and Spain* were published, *Privilegio a Rege indulto*, by RICHARD PINSON, 1525. From that Time the Patents "*ad solum imprimendum*" were innumerable. Men, who had such Rights, might enter their Books as Property in the Stationers Register. But neither the Patent, nor the Entry, can be now received as Evidence of a Common Law Right. The Charter comprehended all the Printers in Eng'land: The new Company had the sole Privilege of Printing, and they agreed to divide the Spoil among themselves; but AUTHORS were not Parties to the Agreement.

*Objection.* The Stationers Company was empowered to make Bye Laws.

*Answer.* They were; and those BYE-LAWS might create a relative Right among the Members of the Company.

In 1681, a BYE-LAW declares, that where a Book was entered to any Member, such Person, by the antient Usage of the Company, was reputed and taken to be the PROPRIETOR. By antient Usage of the Realm had been more conducive to the Point. But it was not competent to the Stationers Company to make Laws for the rest of the Kingdom; and, if it had, it would not be Common Law.

*Objection.* The Decrees of a STARCHAMBER have been cited as strong Authorities in Support of the Bye-Laws and Customs of the Stationers Company.

*Answer.* The STARCHAMBER was a criminal Court, and had not constitutional Authority to determine civil Rights. That Court has been long since abolished, without Regret, and it is the Happiness of the Subject, that the Common Law has flowed through purer Channels.

*Objection.* It has been said, that a STAR-CHAMBER Decree, 1637, expressly supposes a Copy-Right to exist, otherwise than by Patent, Order, or Entry; which could only be by Common Law.

*Answer.*



*Answer.* The relative Rights of the Company were supported *per fas et nefas*, in those Times of high Prerogative: *Licences* from the ARCHBISHOP OF CANTERBURY were frequent, and such *LICENCES*, it is submitted, were neither *PATENT*, *ORDER*, or *ENTRY*. And, moreover, a *Common Law Right* is never expressly mentioned in any *Ordinance*, *Proclamation*, or *Bye-Law*. It is often called the *Right, Privilege, Authority, or Allowance SOLELY TO PRINT*. Had the *STAR-CHAMBER*, and the *HIGH COMMISSION COURT*, expressly stated a *Common Law Right*, it could not be received as an *Authority in Point*; and it is submitted, that a *Common Law Usage* cannot arise by mere *Implication* from dark *Hints* of the *STAR-CHAMBER*.

The same Argument applies to *Acts* of the *Privy-Council*, to *Edicts, Proclamations*, the *Ordinance* of the TWO HOUSES in 1642, and all the *Ordinances* during the *Usurpation*. This whole Body of *Precedents* forms the *History of Despotism*, NOT of the *Common Law*. The most that can be said in their Favour is, that they supported an *Usage* first set on Foot by *Acts of Parliament*, by *Patents, Bye-Laws, &c.*

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*Answer.* One successful *Action at Law* would have been a better Proof of the Right, than a thousand Instances of *arbitrary Power*.

*Objection.* The *LICENSING ACT* has been called in Aid by the Respondents, and they observe, that the printing of any Book WITHOUT CONSENT of the OWNER is forbid by that Act.

*Answer.* The OWNERSHIP was created by *Patent, Order, Bye-Laws* of the Stationers, &c. and if that Act recognized a *Right so created*, it was an ACT OF THE LEGISLATURE; but the Act, with all the other Encroachments upon Liberty, has long since gone to Rest, to revive no more.

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## VII.

*Prerogative Copies*, such as the *Bible*, and *Books of Divine Service*, do not apply to the present Case. They are left to the Superintendence of the Crown, as the HEAD and SOVEREIGN of the STATE, upon Principles of *public Utility*. To ascribe to the CROWN a perpetual Right to the BIBLE upon Principles of *Property*, is to make the CROWN turn BOOKSELLER. If it be true, that the KING paid for the Translation of the Bible, it was a Purchase made for the whole BODY OF THE PEOPLE, for the *Use of the Kingdom*.

*Acts of Parliament*, it is admitted, are the Work of the LEGISLATURE, and therefore under the Direction of the CROWN, as the *executive Part* of the CONSTITUTION. *Property*, therefore, is NOT the Foundation of *Prerogative Copies*.

King Charles I. published a Translation of *David's Psalms*, written, as his MAJESTY says in the Preface, by his ROYAL FATHER. But the Idea of a perpetual *Property* was not then conceived, and therefore a *Patent* was granted to give the sole Right to the BOOKSELLER.

## Objection.

It has been said, that the Authority of such a Man as MILTON is of great Weight. He is represented as speaking, *after much Consideration*, on the very Point, and his Words are, “(1) *The just retaining of each Man's Copy, which God forbid should be gainsaid.*”

## Answer.

MILTON, in the Close of his famous Speech “*for the Liberty of unlicensed Printing*,” in 1644, says, the Ordinance of the two Houses for subjecting the Press to a *Licensor* was obtained by indirect Means. “*It may*,” says he, *be doubted whether there was not in it the Fraud of some OLD PATENTEES and MONOPOLIZERS in the Trade of Bookselling, who, under the Pretence of the Poor in their Company not to be defrauded, and the just retaining of each Man's Copy (which God forbid should be gainsaid) brought divers glossing Colours to the House,*” &c.

MILTON's Idea of *each Man's Copy* arises from the old PATENTEES and MONOPOLIZERS, and certainly, while there was a RELATIVE PROPERTY in the Stationers Company, the poorer Members ought not to be defrauded. He does not say, how long the Copy should be retained, and that is the Point in this Cause. It may be presumed, MILTON could not wish, that *Paradise Lost*, which was sold for 5l. and two further Sums of 5l. to be paid conditionally, should continue a SPLENDID FORTUNE in the Hands of a BOOKSELLER, and his GRAND-DAUGHTER be obliged to beg a *Charity-Play* at Drury-Lane Theatre, 1752.

Doctor (2) SWIFT and Mr. PULTENEY were both clearly of Opinion, that there was no *Common Law Right* and the Opinion of such a Man as Mr. PULTENEY, who was for Years of the first Ability in Parliament, may be allowed to have some Weight. Doctor WATTS published a Volume of Sermons in 1720: Mr. LONGMAN, one of the Respondents, republished it in 1758; and though the Period of 28 Years was expired, a *Common Law Right*, if it existed, would have protected the *Property*: But the Respondent, LONGMAN, annexed to his Edition a *Patent* for 14 Years, dated the 21st March, 1758.

## VIII.

Whatever Encouragement may be due to AUTHORS, the *Common Law* cannot, after the Silence of Ages, pronounce at once upon a new Species of Right, which has been hitherto “*Property not properly known.*”

*Bank Notes* are of a Value well ascertained, and yet the *Common Law* did not adapt itself to that *Emergence of Commerce*, but it was for the LEGISLATURE (3) to make the stealing it or taking it by a Robbery a FELONY.

## IX.

The Statute of Queen Anne was not declaratory of the COMMON LAW, but *introductive* of a NEW LAW, to give learned Men a *Property* which they had not before.

## Objection.

It has been contended on the Part of the Respondents, that the Act of Queen Anne is an ACCUMULATIVE STATUTE, declaring the *Common Law*, and giving additional Penalties.

(1) *Milton's prose Works*, 1 Vol. 4to. Fol. 172.  
(2) See 3 Vol. of *Swift's Letters*.

(3) See 2 Geo. II. Chap. 25.



In support of this, a Pamphlet, said to have been given to the Members in 1709, has been cited, and it appears that the Bookfellers meant to inculcate the Idea of *antient Usage*, but what that *Usage* was, how it took its Origin, and how it was stated in the Pamphlet, the Extract leaves in Obscurity.

*Answer.*

Cotemporary Exposition will, no doubt, deserve Attention. To this End, the *History* of the Bill, as it stands upon the *Journals* of the HOUSE of COMMONS, together with the Account of the *Conference* with the LORDS, will clearly evince, that the LEGISLATURE were not employed in SECURING an *antecedent Property*, but expressly declared, "that AUTHORS and Bookfellers had the *sole Property of Books* VESTED in them, by that *Act*, for the Terms therein mentioned." (1) When the Bookfellers Petition was presented; also their 2d Petition, 2d Feb. 1709—14th March 1709, resolved that the Title be a Bill for the *Encouragement of Learning*, by VESTING the COPIES in the Authors or Purchasers, &c. 5th April the Bill returned from the Lords—5th April 1710, a Conference with the Lords and Mr. ADDISON, one of the Commons.

*Objection.*

Of this Evidence the Respondents feel the Weight, and therefore they resort to a *Variety of Comments* upon the STATUTE itself.

They rely much upon the *Preamble*: The Words are, "Whereas Printers, Bookfellers, and other Persons, have of late frequently taken the Liberty of printing, &c. Books and other Writings without the Consent of the Authors or Proprietors of such Books, to their very great Detriment, and too often to the Ruin of them and their Families; for preventing therefore such Practices, for the future, &c."

From the Words "*taking the Liberty*," and "*such Practices*," it is inferred that the Persons within the Description of them, were WRONG DOERS. A Question is put, When the Legislature speak of a Liberty taken, could they mean a *Claim founded on any Right*? And by "*Practices*," did they mean to describe the Exercise of a *legal Right*? The Word "*Practices*" is properly applied to the doing of *illegal Acts*.

*Answer.*

If they were *wrong Doers*, the LEGISLATURE has used the mildest Terms in the Compass of our Language; but it is submitted that they were not *Trespassers*. After the final Extinction of the licensing Act, 1694, Men had a Right to re-print Books in the same Manner as PRINTSELLERS had lawful Authority to copy, engrave, and publish *all Works, Designs, and Prints* which were not secured to the INVENTORS by PATENT for a Term of Years; and yet the Legislature by 8 Geo. II. Chap. 13. in the very same Words recites in the Preamble, "Whereas divers Printfellers, &c. have of late frequently taken the Liberty of copying, engraving, &c. and for preventing therefore *such Practices*, &c. Again, in the 7 Geo. III. Chap. 38. the Printfellers who engraved and exposed to Sale the *Designs and Prints* of the late WILLIAM (2) HOGARTH, after the Period of fourteen Years granted to him by PARLIAMENT, are in that Act

(1) See Com. Journ. 12 Dec. 1709.

(2) "There is nothing can be more similar, than the Art of Engraving is to literary Composition; I will illustrate this Proposition by the Works of Mr. Hogarth, who, in my humble Opinion, is the only truly original Author, this Age hath produced in England. There is scarcely any Character of an excellent Author, that is not justly applicable to his Works; what Composition!—what Variety!—what Sentiment!—what Fancy!—what Invention and Humour we discover in all his Performances! in every one of them an entertaining History, a natural Description of Characters, and an excellent Moral: I can read his Works over and over again: *Horace's* Characteristic of Excellency in Writing is verified in *Hogarth's* Prints, *decies repetita placebit*; every Time I peruse them, I discover new Beauties, and receive fresh Entertainment. Can I say more in Commendation of the literary Compositions of a *Butler*, or a *Swift*? There is great Authority for this Parallel. The Legislature hath considered the Works of Authors and Engravers in the same Light; they have granted the same Protection to both; and it is remarkable, that the Act of Parliament for the Encouragement of those who invent Engravings, runs almost in the same Words, as the Act for the Protection of literary Compositions." See *Lord Gardenstone's* Argument on giving his Opinion, upon the Question of Literary Property, between *Hinton* and *Donaldson*, in *Boswell's* *Scottish* Decision of the Court of Session, in that Cause, published at Edinburgh in 4to. A. D. 1774.

called



called the PROPRIETORS of the Copies of WILLIAM HOGARTH's Works, and then the LEGISLATURE proceeds to *restrain* those very PROPRIETORS from vending the Copies, which were their *legal Property*.—Thus it is plain, that the LEGISLATURE speaking of a *legal Right*, described it by the Words "*taking the Liberty*," and such "*Practices*."

If by the Terms, "*taking the Liberty*," and such "*Practices*," it can, by fair Construction, be intended that *Injustice, Fraud and Rapine* are implied, the like Imputation is thrown upon the *Printfellers*, who exercised a *legal Right*, and are allowed to be PROPRIETORS.

It may be presumed, that if the LEGISLATURE had perceived a *Real Guilt* or *illegal Practices*, they would, agreeably to their own Dignity, have kept no Terms with Men, who *violated Laws*, and *wrought the Ruin of Families*.

But Learning, to the Honour of the LEGISLATURE, was to be encouraged; and it may be asked, if the *Statute of Queen Anne* did not *create a new Property*, what was done for Learning?

If the Right was *antecedent* to the Act, How did the LEGISLATURE *vist* the Property in Authors?

If the LEGISLATURE had the faintest Idea of a *pre-existing Property*, why was the *sole Right* of reprinting Books, which had been *previously* published, restrained to twenty-one Years, and *no more*? A strange Way of *encouraging Learning*, by abridging *ancient Rights*!

If the Act of *Queen Anne* intended merely to give *additional Penalties*, by Way of new Fences to a *common Law Right*, Why give those Penalties for fourteen Years only? If the Property is *perpetual*, Why should not the Remedy be *co-extensive*?

If by "*Copy*" be understood a *perpetual Property*, the Author who sold his Copy under the Idea of a Transfer for *fourteen Years only*, may be told by an *artful Bookseller*, that *more was meant than meets the Ear*, and that a *Sale of his Copy* imports a SALE FOR EVER. The Consequence will be, that, instead of encouraging Learning, a Snare has been *unwittingly* spread for Men of Genius and Industry, and the *Clause* of the STATUTE, which gives a Reversion to the AUTHOR at the End of fourteen Years, *if he live so long*, will be eluded by the Craft, and, as MILTON phrases it, by the *Sophisms of Merchandize*.

If the Book, at the End of fourteen Years, reverts to the Author, his Interest is served: If it does not, the LEGISLATURE, by such a Construction, has extended *no Benefit to learned Men*.

But happily it appears that PARLIAMENT has revised its own Acts, and in Terms as clear as the English Language affords, declared, that the *Property was given* by the Act of *Queen Anne*. For

7. Geo. II. Chap. 24. is intitled, "An Act for granting to Samuel Buckley the *sole Liberty* of printing and reprinting the *Histories* of *Thuanus*. The Preamble recites, "that *Buckley* at a very great Expence had prepared an Edition of *THUANUS* in 7 Volumes Folio, "and then adds," Whereas the *sole Liberty of printing and reprinting Books* for the Term of *fourteen Years*, to commence from the Day of the publishing the same, GRANTED TO THE PROPRIETORS THEREOF, by an Act made in the 8th Year of *Queen Anne*, intitled, an Act for the *Encouragement of Learning*, BY VESTING THE COPIES of printed Books in the AUTHORS or PURCHASERS, &c.

Of the Sense and Meaning of the Legislature, we are now *fully informed* by the HIGHEST AUTHORITY: He that runs may read the Intent and Scope of the Statute: "The *sole Liberty* of printing and reprinting for the Term of *fourteen Years* WAS GRANTED by the 8th of *Queen Anne*."

The Law was made for the *Encouragement* of Learning: *INGENUITY* has endeavoured to puzzle it, but the LEGISLATURE has given the Exposition.

X. The



X. The Notion of "a PERPETUAL PRIVILEGE and MONOPOLY," hath been within these few Years, hatched among the Booksellers ; who now come with *glossing Colours*, and, under a *Pretence of serving the Cause of Literature*, but mean really and only to get the *Fruits of Genius* into their own Hands, for ever. The Consequences of this new Doctrine (were it established) would be fatal to the *Interest of Letters*, and the *Fame* of every valuable Author.

Books may be held up at too high a Price. Notes and Illustrations may be wanted, and generally are, in thirty or forty Years ; not only the *Manners*, but even *Science* itself changes in the Progress of Time. *Moral Philosophy*, and *Mathematicks* should keep pace with the Vicissitudes of the World. Useful Commentaries upon valuable Works cannot be made without the Licence of the BOOKSELLER, who has purchased the Copy : His *Avarice*, his *Timidity*, or his *Want of Sense* may tell even the ORIGINAL AUTHOR, that he shall not re-print his OWN BOOK with further Improvements. If the Author should happily be permitted to do it, it must be upon the Bookseller's Terms ; but more probably the Frugality of the BOOKSELLER will grudge an additional Expence, and taking upon him to pronounce upon Wit, he may say, that he likes the Book as it is.

MILTON, in his famous Speech, has thought this Head of Argument an important Topic against a *Licencer of the Press*. His Words are, "What if the Author shall be one so copious of *Fancy*, as to have MANY THINGS, well worth the adding, come INTO HIS MIND after LICENSING, while the Book is yet under the Press, which not seldom happens to the best and diligentest Writers, and that perhaps a dozen Times in one Book. The Printer dares not go beyond his licensed Copy ; so often then must the Author TRUDGE TO HIS LEAVE-GIVER, that those his NEW INSERTIONS may be viewed ; and many a Jaunt will be made, ere that Licencer (for it must be the same Man) can either be found, or found at leisure : Mean while either the Press must stand still, which is no small Damage, or the Author LOSE HIS ACCURATEST THOUGHTS, and send the Book forth into the World, WORSE THAN HE COULD MAKE IT, which to a diligent Writer is the GREATEST MELANCHOLY and VEXATION that can befall."

In the Case of a *perpetual Privilege and Monopoly*, the Bookseller becomes the Author's LEAVE-GIVER : Many a Jaunt may be made that his new INSERTIONS may be viewed, and at length he may sit down with the MELANCHOLY and VEXATION of leaving his Book WORSE THAN HE COULD MAKE IT.

XI. Should the Work, pursuant to the Statute of Queen Anne, revert to the AUTHOR in fourteen Years, he will become the Guardian of his own Fame ; and, in Consequence, *learned and industrious Men will be enabled to reap not only the Fame, but the Profits of their Labours, to the Honour and Advantage of themselves and their Families.*

Objection. It has been colourably said, that for a *perpetual Property* Authors may raise in their Demand, and gain a much LARGER SUM for the Copy ; or they may publish upon their own Account, and feel the Pulse of the Public before they dispose of the Copy.

Answer. Except one or two very modern Instances, a competent Price has not been given. If Booksellers have hitherto been dealing under an Idea of a PERPETUAL MONOPOLY, they have not paid an adequate Compensation for it, and the same Phlegm will govern their future Transactions. It is a melancholy Consideration, that even a Writer of Mr. THOMPSON's Merit does not appear to have received ONE HUNDRED POUNDS for the Poems of the SEASONS. The whole

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Sum paid to him for a Variety of Articles was 242l. 10s. The Tragedy of *SOPHONISBA*, at the old Price for a Play, was worth 105l. The Poem, sacred to the Memory of Sir ISAAC NEWTON, BRITANNIA, and an Essay on *Descriptive Poetry*, from the Pen of THOMPSON, were worth a considerable Sum. How much remains for the Seasons? no Work of late Years has been more generally received: The Profits to MILLAR must have been large, and, after all, the Copy sold for 505l. at a public Auction.

If Authors had always Access to a CLARENDON PRESS, where the precise Number ordered would be printed, *and no more*, the Impression might be distributed to the London Booksellers, and an Author might stand the Hazard. But AUTHORS are not often in that Situation, and, besides, the immediate Expence of Paper and Print is not favourable to such Experiments.

A Period of fourteen Years is a sure Test of every Book. If, after that Time, it be worth reprinting, the Authors ACCURATEST THOUGHTS may be interwoven, and the *Fame* and *Profit* will accrue to the Man of Labour and Invention.

But if a PERPETUAL PRIVILEGE and MONOPOLY are to interrupt his Hopes, the PURCHASERS of the Copy will be enriched, and, in the emphatic Words of DRYDEN, "It will continue to be the Ingratitude of Mankind, that they who TEACH WISDOM by the SUREST MEANS, shall generally live poor AND UNREGARDED; as if they were born ONLY FOR THE PUBLIC, and had no Interest in their own well-being, but were to be LIGHTED UP LIKE TAPERS, and waste themselves for THE BENEFIT OF OTHERS."

E. THURLOW.

J. DALRYMPLE.

AR. MURPHY.

## CASE of the RESPONDENTS.

Mr. Thompson was Author of a Poem called *Spring*, and on 16th Jan. 1729, assigned the Copy-right to Andrew Millar.

**JAMES THOMPSON**, late of Richmond, in Surry, Esq; deceased, was, in his Life-time, the Author of a Tragedy called *Sophonisba*, and also a Poem intitled *Spring*.—In January 1729, Andrew Millar (now deceased) contracted with Mr. Thompson for the Purchase of the said Tragedy and Poem; and, by Indenture, dated the 16th of January, 1729, Mr. Thompson, in Consideration of 137l. 10s. paid to him by the said Andrew Millar, did assign to the said Andrew Millar, his Executors, Administrators, and Assigns, the true Copies of the said Tragedy and Poem, and the sole and exclusive Right and Property of printing the said Copies, for his and their sole Use and Benefit: And also all Benefit of all Additions, Corrections, and Amendments, which should be afterwards made in the said Copies.

Mr. Thompson was also the Author of several other Poems, particularly three, called *Summer*, *Autumn*, and *Winter*; and an *Hymn on the Succession of the Seasons*; and on 28th July, 1729, assigned the Copies of them to John Millan.

Mr. Thompson was also the Author of the following Poems, viz: a Poem called *Summer*, a Poem called *Autumn*, a Poem called *Winter*, a Poem called *Britannia*, a Poem sacred to the Memory of Sir Isaac Newton, an *Hymn on the Succession of the Seasons*, and an *Essay on descriptive Poetry*; and, in Consideration of 105l. which, by a Receipt under his Hand, dated 28th of July, 1729, he acknowledged to have received from John Millan, of the Parish of St. Margaret, Westminster, Bookseller, Mr. Thompson sold to the said John Millan the Copies of the several Poems last mentioned, with the sole Right of printing and publishing them, together with such Alterations and Additions as the Author should afterwards occasionally make.

About



About June, 1738, the said Andrew Millar contracted with the said John Millan for the Purchase of the several Poems last mentioned, so sold to him by Mr. Thompson: And, by Indenture, dated 18th June, 1738, John Millan, in Consideration of 105l. paid to him by Andrew Millar, did assign unto the said Andrew Millar, his Executors, Administrators, and Assigns, the several Copies of the Poems last mentioned, with all the Corrections, Alterations, and Additions, which the Author had made, or should make; and all the Right, Title, Interest, Property, Claim, and Demand of the said John Millan to, or in, the said Copies. And also, the several Plates of the Prints of the said *Seasons*, and the Plate of the Print in the Frontispiece of the said *Seasons*: And also, the Plate of the Print of Sir Isaac Newton's Monument: All which Prints had been usually bound up with the said Poems and Pieces.

By Virtue of the aforesaid Indenture, Andrew Millar became lawfully intitled to all the Profits arising by the printing and publishing of the several Poems before-mentioned, and to the sole and exclusive Property and Right of printing Copies of them, and of vending and disposing of the same.

Andrew Millar died in June, 1768, having first made his Last Will, in Writing, dated 20th February, 1768; and thereof appointed his then Wife, Jane Millar, (now Dame Jane Grant) William Millar, Thomas Longman, and the Respondent, Thomas Cadell, Executors.

Soon after Andrew Millar's Death, his Will was duly proved by his Widow, the said William Millar, and the Respondent Thomas Cadell, who thereby became intitled to the several Copies of the Poems before mentioned to have been purchased by the said Andrew Millar, and to the sole Right of printing, publishing, and vending them.

On the 13th June, 1769, the Copy-right of the several Poems before mentioned, with the sole Right of printing, publishing, and vending them, was sold, by Order of Andrew Millar's Executors, by Auction, at the Queen's Arms Tavern, in Saint Paul's Church-yard, London. At this Sale, the Respondents purchased the Copy-right of the said Poems, in the Proportions, and for the Prices, following, viz. John Rivington purchased one fifteenth Part of the said Copy-right for 32l. 12s. William Johnston, another fifteenth Part for 32l. 12s. William Strahan, another fifteenth Part for 32l. 12s. Thomas Longman, another fifteenth Part for 32l. 12s. William Richardson, and John Richardson, two twelfth Parts for 88l. 10s. Thomas Lowndes, one-twelfth Part for 43l. Thomas Caslon, one-twelfth Part for 43l. George Kearsley, one-twelfth Part for 42l. Henry Baldwin, one-twelfth Part for 42l. Thomas Cadell, one-fifteenth Part for 32l. 12s. William Owen, one-twelfth Part for 41l. 10s. Thomas Davies, one-twelfth Part for 42l. and Thomas Becket and Peter Abraham De Hondt purchased of the said Thomas Davies one-twenty-fourth Part for 21l. Afterwards the Respondents respectively paid to the Executors of Andrew Millar the several Sums of Money agreed at the Auction to be given for their several Parts of the Copy-right in the said Poems, and thereby became intitled to the said Copy-right, in the several Proportions before mentioned.

After the Purchase by the Respondents of the Copy-right in the said Poems, the Appellants, notwithstanding the sole and exclusive Right which the Respondents claim of printing, publishing, and vending all the said Poems, published and sold several thousand Copies of the said Poems called *Spring*, *Summer*, *Autumn*, and *Winter*, and the said *Hymn on the Succession of the Seasons*, in a Volume intitled, *the Seasons*, by James Thompson; Edinburgh, printed by A. Donaldson, 1768; and thereby acquired considerable Profits, to the great Loss and Prejudice of the Respondents.

Upon



21st January, 1771, Respondents filed a Bill in Chancery against the Appellants, for an Account of the Copies sold, and to restrain them from selling any Copies in future.

Upon this, the Respondents applied to the Appellants to stop the Sale of the Poems and Hymn, so published and sold without the Consent of the Respondents, and for an Account of the Number of Copies sold, and of the Monies which had been received for them. But the Appellants refusing either to stop the Sale, or to Account; the Respondents, on the 21st of January, 1771, filed a Bill in Chancery against the Appellants; thereby stating the several Facts before mentioned, and praying that the Appellants might answer the Premises, and come to an Account with the Respondents for the Money which the Appellants had received by the Sale of the said Poems and Hymn; and that the Appellants might for ever after be restrained by the Injunction of the Court from publishing the said Poems and Hymn, and from selling any Copies of them in future, and for general Relief.

Answers of the Appellants: sworn 16th and 20th July, 1771.

The Appellants, in their Answers, insist, That the several Terms of fourteen Years, and fourteen Years, given by the 8th Ann, Chap. 19, having expired in 1757, as to the Poems in Question, the Appellants had a Right to print, publish, and sell Copies of them, without Consent of the Respondents.

On the 16th and 20th July, 1771, the Appellants put in their Answers, and thereby admit, That Mr. Thompson was the Author of the several Poems mentioned in the Bill, but deny all Knowledge of the several Assignments, which the Bill states, of the Copies of the said Poems; and say, that they believe that Mr. Andrew Millar, by Virtue of the several Indentures mentioned in the Bill, or by any other Means, did not become intitled to the Copy-right in the Poems before mentioned, for a longer Time than the several Terms limited by an Act passed in the eighth Year of her late Majesty Queen Ann, intituled, *An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors, or Purchasers of such Copies, during the Times therein mentioned.* The Clauses relied upon in the Answer of the Appellants are, that by which it is enacted, (1) *That the Author of any Book, or Books, then already composed, and not printed or published, or that should thereafter be composed, and his Assignee, or Assigns, should have the sole Liberty of printing and reprinting such Book, and Books, for the Term of fourteen Years, to commence from the Day of first publishing the same, and no longer; and a Proviso, by which it is further enacted, (2) That after the Expiration of the said Term of fourteen Years, the sole Right of printing and disposing of Copies shall return to the Authors thereof, if they are then living, for another Term of fourteen Years.* The Appellants, in their Answers, also say, That the Copies of the several Works, in the Bill mentioned to have been written by Mr. Thompson, having, as appears by the Bill, been assigned by him, and first published, in 1729; the sole Right of printing, publishing, and selling the same could not be extended beyond the Term of twenty-eight Years, from the Time of such first Publication, which Term expired in 1757; and deny, that during the said Term they were concerned in the printing, publishing, or selling any Copies of the said Works. They admit the Death of Andrew Millar; and that, before his Death, he made his last Will, and appointed such Persons Executors, as in the Bill are named; and that it was proved in Manner therein mentioned. But they insist, for the Reasons aforesaid, that the Executors of Andrew Millar did not, by his Will, or otherwise, become intitled to the sole Right of printing and publishing the said Poems. The Appellants admit in their Answers, that they have, since the Expiration of the said Term of twenty-eight Years, without the Consent of the Respondents, printed, published, and sold several Copies of the Poems in the Bill mentioned; and insist, that unless the Respondents are able to make out a Title to the sole and exclusive Property of the said Poems, pursuant the aforesaid Act of Parliament, the Appellants are, by Virtue of that Act, well authorised in printing, publishing, and selling the said Poems, and are not compellable to account for, or discover the Number of Copies they had printed, published, or sold, and ought not to be restrained from the further Publication and Sale of the same; and, therefore, claim the Benefit of the said Act of Parliament, as if they had pleaded the same in Bar to the Relief and Discovery sought by the Bill.

20th Nov. 1771, the Respondents amend their Bill by making the Respondent, Thomas Cadell, a Party.

On the 17th November, 1771, the Respondents obtained an Order for leave to amend their Bill; and it was amended accordingly, by making the Respondent, Thomas Cadell, whose Name was before omitted, a Party.

(1) By Sect. 1.

(2) By Sect. 11.

After-



## R E S P O N D E N T S.

17

Afterwards, the Respondents replied to the Answer of the Appellants; and they rejoined: And then the Cause being at Issue, two Witnesses were examined by the Respondents to prove Mr. Thompson the Author of the before mentioned Poems, and the several Assignments of the *Copy-right* in them to Andrew Millar, and the Sale, by his Executors, to the Respondents.

On the 16th November, 1772, the Cause was heard before the Right Honourable the Lord Chancellor, when his Lordship was pleased to decree, That the Injunction, which had been before granted in the Cause, should be made perpetual; and that it should be referred to the Master to take an Account of what had been received by the Appellants, or either of them, or by any other Person by their Order, or for their Use, from the Publication and Sale of the Poems in the Pleadings mentioned, and that the Appellants should pay unto the Respondents what should be found due to them on the Balance of the said Account; and his Lordship reserved the Consideration of Costs until the Master should have made his Report; and any of the Parties were to be at Liberty to apply to the Court as there should be Occasion.

16th Nov. 1772, the Lord Chancellor's Decree for the Respondents.

From this Decree the Appellants have brought their Petition and Appeal, praying that it may be reversed. But the Respondents are advised, and humbly beg leave to contend, that the Decree of the Lord Chancellor is just and equitable, and ought to be affirmed; and that the Petition and Appeal ought to be dismissed with Costs, for the following (amongst other)

## R E A S O N S.

- I. The Claim of Authors to the sole and exclusive Right of printing and publishing their own Works, is founded upon Principles of Reason and natural Justice. It is just and equitable, that those, who labour in the Advancement of Knowledge, and communicate their Ideas in written Compositions to the Public, should have a Recompence; and in order to obtain a suitable one, Authors, when they publish their Works, mean to reserve to themselves the Right of multiplying printed Copies; and the Nature of Printing, and the Circumstances attending a Publication, being considered, there is an *implied Agreement*, on the Sale of each particular Copy, that the Purchaser shall not invade the beneficial Right of multiplying Copies intended to be reserved by the Author.
- II. From the first Introduction of the Art of Printing into England, this peculiar Species of Property has been known by the expressive Name of *Copy-right*; has continually been the Subject of *Sale*, *Gift*, and *Family Settlement*; has always been protected from Invasion; and, in some Instances, has even been *recognized by the Legislature*.
- III. It is a Point too well established to be denied, that at *Common Law*, the sole and exclusive Right of multiplying for Sale the Copies of Acts of Parliament, Proclamations, and other Papers of a *public Nature*, belongs to the King, and his Patentees; not in consequence of any Prerogative over the Art of Printing, but on Account of his peculiar Interest, as the *executive Power*, in all Publications and Acts of State flowing from himself, or Parliament. This shews, that an *Interest* or *Property* similar to that claimed by Authors, may subsist at *Common Law*; and though the Reasons, on which Authors claim an *Interest* in their own *private Copies*, are not precisely the same as those from which the *Interest* of the Crown in *public Copies* is derived, yet they are not less



less forcible ; but give to Authors a Title of Property, as well founded in *Justice*, as the Title of the Crown is founded in *Policy*, and one equally consistent with Public Utility.

- IV. There is nothing in the Statute of Queen Ann to take away that Interest or Property, to which Authors were before intitled in the Publication and Sale of their own Works. The Object of that Statute was to secure Literary Property by Penalties from Piracy and Invasion ; and though the Protection given is only *temporary*, yet, so far from being made so under an Idea of the Legislature, that Authors had no Property in their Works before, or with an Intention to limit its Duration, the Statute expressly declares, that nothing contained in it shall *prejudice* or confirm any Right which the Universities, or any *Person or Persons*, might claim to the printing or reprinting of any Book or Copy then printed, or *afterwards* to be printed.
- V. Since the Statute of Queen Ann, many Injunctions have been granted by the Court of Chancery to restrain the Invasion of *Copy-right*, notwithstanding the Expiration of the Term during which *only* the Statute gives a Protection by Penalties ; and the Opinion of the Chancellors, who granted such Injunctions, has been confirmed by a Judgment of the Court of King's Bench in Favour of Literary Property, which was given after solemn Argument.
- VI. Upon the Faith of the Protection, which has hitherto been given to Literary Property independently of the Statute of Queen Ann, great Sums of Money have been expended in purchasing *Copies* ; and if such Protection should be now withdrawn, many Hundred Families will lose their whole Estates, and necessarily be involved in Ruin.

AL. WEDDERBURN.

J. DUNNING.

FRA. HARGRAVE.

ARGUMENTS



# ARGUMENTS

OF THE

## COUNCIL FOR THE APPELLANTS.

I SHALL endeavour, my Lords, to shew that the Decree of the Court of Chancery, pronounced on the 16th Day of November, 1772, in Favour of the Respondents, to be highly injurious to the Appellants, my Clients; and that what is termed LITERARY-PROPERTY, is not warranted or secured at Common Law. The Idea inculcated by what is called a *Publication*, is not that mysterious Thing the bookselling Trade would make it, being simply a Multiplication of Copies; and whether they were multiplied to the Number of five or five hundred, signifies not an Iota to the Matter in Dispute. Previous to the Invention of Printing, Scribes, for copying an Author's Work, obtained a greater Remuneration than Persons who, since the Invention of Printing, diffuse Writings by Means of certain Types.

Mr. Attorney  
General Thurlow.

Property, my Lords, of whatever Kind, is that which is begun by Occupancy, and continued by Possession. Metaphysicians talk of Property in Life or Limb, in Fame, Honor, and Character; but this is not a Language Lawyers can adopt. There is, also, such a Thing as Property by Specification; but under what Denomination is Literary Property to be arranged? Is it corporeal or incorporeal? If corporeal, it is descendible, like any other Chattel; if incorporeal, how is its Incorporeality to be ascertained? how specifically distinguished from its Appendage or Adjunct, the corporeal Part? To say that a Man has a Property in the Ideas of a Book, and none in the Book itself, is as if one should affirm that a Man has a Property in the Coloring of a Picture, but none in the Canvass on which that Coloring is laid; or as if Mr. (1) Harrison had a Property in the Discovery made by his Time-Piece, but none in the Wheels or mechanical Parts of which it is composed: a Notion to the last

(1) Lord Camden, as Lord Chief Justice of the *Common Pleas*, on a Question reserved for the Consideration of that Court, on a Trial before him, Whether a Man might exercise as many Trades as he had worked at, or served seven Years Apprenticeship to; in giving the Opinion of the Court, which was in the Affirmative, observed, "That Mr. Harrison served an Apprenticeship to the Trade of a Carpenter, but that for 26 Years had been a Watchmaker; and though he had never served as an Apprentice to the Trade of a Watchmaker, was the best Maker of Time-Pieces in the World, and the Parliament had given him 5000l. towards finding out the Longitude by the Help of his Watches or Time-Measurers: And shall this Man (said Lord Camden) be hindered from making Watches, and exercising the Trade of a Carpenter also, if he pleases?" *Wils. Rep.* C. B. 169.



last Extreme absurd! Applying this to the Case of an Author; if he had any distinct exclusive Property in a Book, separate from the material and corporeal Part, I have no Objection to admit this exclusive Property, provided he will demonstrate to me *quo Jure* the Property accrues.

I should now, my Lords, proceed to consider the Sense of the Word Property, and to define it philosophically, and in the separate Lights of being corporeal and spiritual; but as your Lordships are in Possession of the printed Case of the Appellants, you are in Possession of every Thing in my Power to urge in that View of the Subject; I will not therefore presume to draw the Attention of your Lordships unnecessarily, by troubling you with a Repetition of what I am persuaded you are all so well informed of.

The Booksellers, my Lords, have not, till lately, ever concerned themselves about Authors, but have generally confined the Substance of their Prayers to the Legislature, for the Security of their own Property; nor would they probably have, of late Years, introduced the Authors as Parties in their Claims to the Common Law Right of exclusively multiplying Copies, had they not found *that* necessary to give a colorable Face to their Monopoly. For several Cases exemplifying this Observation I beg Leave again to refer your Lordships to the said printed Case; all the Grants, Charters, Licences, and Patents from the Crown, as well to corporate Bodies as Individuals, (which are traced far back in the said printed Case) specifically prove, that if there had been any inherent Right of exclusively multiplying Copies, such Instances of exerting the Royal Prerogative would have been unnecessary. The Statute of Queen (1) *Anne* is not merely an accumulative Act, declaratory of the Common Law, and giving additional Penalties, but a new Law to give learned Men a Property which they had not before; and it is an incontrovertible Proof that there previously existed no Common Law Right, as contended for by the Respondents; nor hath the Question touching the Common Law Right ever been decisively determined by any Chancellor. Many Cases, my Lords, some before 8 An. Chap. 19. and others immediately upon that Statute, generally inferring, that the grand Question touching the Common Law Right, had never been decisively determined by any Chancellor; will be found collected in our Point of View, and in chronological Order, in the said printed Case.

No such Idea, my Lords, as that of an exclusive Right to multiply Copies prevailed previous to, or indeed long after, the Invention of Printing. This is instanced in several Cases, adduced for that Purpose, by the Appellants, in their said printed Case, where one Writer complains of another for printing his Works, not on account of any Violation of Property, but merely because the Party complained of had printed them inaccurately. Literary Property consists only in the Imagination; it never, till it was found advantageous, entered into the Head, of Booksellers themselves; Authors never conceived the Notion of any Property

Since the above reported Compliment, the Parliament have granted Mr. *Harrison* the further Sum of 8750l. for the Discovery of the Invention of his Time-Keepers, by Stat. 13, Geo. III. Chap. 77, Sect. 29. And the late Mr. Justice *Yates*, in giving his Opinion on this very Question of *Literary Property*, observed, that Examples might be mentioned of as great an Exertion of natural Faculties, and of meritorious Labour in the mechanic Inventions, as in the Case of Authors. "We have" (continues the Judge) a recent Instance in Mr. *Harrison's* Time-Piece, which is said to have cost him near 50 Years Application; and might not he insist upon the same Argument, the same Chain of Reasoning, the same Foundation of moral Right, for Property in his Invention, as an Author can for his?" See *Bur. Lit. Prop.* 70, 102.

(1) 8 An. Chap. 19: An Abstræct whereof is added by Way of Appendix.

vesting



vesting in them, but what was given by Statute, by Patent, the licensing Acts the royal Privilege, or in Virtue of the Institution of the Stationers Company. What is called Literary Property gave rise to a scandalous Monopoly of ignorant bookfellers, who, fattened at the Expence of other Mens Ingenuity, grew opulent by Oppression. As the Lords of Session have freed (1) Scotland from such a Monopoly, I sincerely hope your Lordships, following so praise-worthy an Example, will emancipate this Kingdom from such an odious Oppression.

It should be considered, my Lords, that this pretended Property, which is supposed to have a Foundation in Common Law, cannot in the Records of the Common Law Courts any where be found: If you speak of the Subject before the Act of Queen *Anne*, you hear of nothing but licensing Acts, and the Company of Stationers — My Lords, during the tory Reign of King Charles the Second the Bookfellers were the mere Engines of the Court's Designs, and therefore the licensing Act sufficed; — it was the same through the tory Reign of King James the Second, while it was the Court side of every Question that could alone be handled with safety; the licensing Act gave that Property to the Bookfellers, which was sufficient for their Purpose. In the whig Reign of King William they began to move out of the old Sphere, and then we accordingly find new Movements. In the tory Reign of Queen *Anne* they looked out for fresh Securities; then first appeared a new Trade. My Lords, the Bookfellers then found they could make as much or more by abusing the Sovereign, her Parliament, her Council, her Servants, and her Government, than they could before make by the Support of them. Printing Books thus coming into Opposition to the Court, the Trade laboured hard to establish a Right to their Copies independent of the Court. They applied every where for the Means of establishing that Right; but were forced at last to have recourse to Parliament to establish and vest in them a Right which the Common Law did not give them.

*Sir John Dalrymple.*

My Lords, the History of the Act of Queen *Anne* deserves your Lordships Attention: What was the View of the Bookfellers? Absurdity on the very Face of it. They applied for an Act, vesting in them a Property for fourteen Years which they pretend to have derived from the Common Law, for Futurity. Can it be supposed that Men who were any Ways clear in their perpetual Right, would apply for a fresh Right for fourteen Years only? It could not be. They knew their own Situation: they knew the Rottenness of their pretended Right, and wanted a new real one, instead of the old imaginary one.

Yet, my Lords, this Act, which changed their Perpetuity to a Term of fourteen Years, was obtained at a Period when the Interests of Learning was far from being without good Support: *Addison*, after being the Friend of many Ministers, became Secretary of State; and *Swift* was high in the Esteem, and an Adviser of the Heads of another Party. Happy would it be, my Lords, if Ministers had always such Friends, and such Advisers!

But, my Lords, this Act of Queen *Anne*, which was ushered in under the Idea of encouraging Literature, was very far from having such a Tendency. It was to encourage Bookfellers, but not Authors; however, supposing both interests the same, — What did they gain? Why, a Perpetuity was changed to a Term of

(1) See *Boswell's* Decision of the Court of Session, upon the same Question, in the Cause of *Hinton v Donaldson* & al. 4to, 1774.



## A R G U M E N T S F O R

fourteen years only. A Price was fixed, and a Clause inserted to force them to send Copies to public Libraries — What Encouragements are these? — They, on the contrary, were Discouragements. — All which is sufficient to shew that the Booksellers never dreamed of a serious Property at Common Law for Perpetuity; had they such a Notion they would have petitioned against the Act.

Observe, My Lords, the Title of the Act: *To vest the Copy-rights*: that is, my Lords, to give them a Right they had not before; a marked Expression which could not be mistaken. — And though the Word *secured* is used in the Body of the Act, it does not enter there as the Signification of a different Idea: it is the same Idea: the Bill was to vest a new Property, and provide accordingly, and inflict Penalties, after which the Word *secures* occurs, and is used perfectly consistent with the former Term.

What could be more absurd, my Lords, than an Act to vest a perpetual Right to a set of Persons for a limited Term, and inflicting Penalties? Lord Shaftsbury tells us that Ridicule is the Test of Truth: let us try such an Act by that Test. I will read an imaginary Act which enacts such Purposes.

*An Act for the Encouragement of PLANTING, by vesting THE SHOOTS OF HEDGES and BRANCHES OF TREES, IN THE PLANTERS, during the Times therein mentioned.*

An imaginary  
Act of Parlia-  
ment.

After first April,  
1774, the Plan-  
ters of Hedges or  
Trees already  
planted, who have  
not transferred  
their Rights, and  
the Botanists,  
&c. who have  
purchased Shoots  
or Branches,  
shall have the  
sole Right of  
planting them,  
for 21 Years.  
And the Planters  
of Hedges or Trees  
not planted, to  
have the sole  
Right of planting  
for 14 Years.  
Punishment of  
Botanist, &c.  
planting without  
the Consent of  
the Proprietor.

“ WHEREAS Botanists, Florists, Gardeners, Nurserymen, and other persons, have of late frequently taken the Liberty of *planting, transplanting, and advertizing*, or causing to be *planted, transplanted, and advertised*, Hedges, Trees, and other Plants, without the Consent of the Proprietors of such Hedges, Trees, and other Plants, to their very great Detriment, and too often to the Ruin of them and their Families.” “ For preventing therefore such Practices, for the future, and for the Encouragement of *ingenious Men to set and rear up necessary Hedges and Trees*, may it please your Majesty, that from and after the first Day of April, 1774, the Planter of any Tree or Trees, or of any Hedge or Hedges, already *planted*, who hath not transferred, to any other the *Shoot or Shoots, Branch or Branches*, of such Hedge or Hedges, Tree or Trees, Share or Shares thereof, or the Botanist or Botanists, Florist or Florists, Gardener or Gardeners, Nurseryman or Nurserymen, or other Person or Persons, who hath or have purchased or acquired, the *Shoot or Shoots, Branch or Branches, of any Hedge or Hedges, Tree or Trees*, in order to *plant or transplant* the same, shall have the sole Right and Liberty of *planting* such Tree and Trees, and such Hedge and Hedges, for the Term of 21 Years, to commence from the said first Day of April, and no longer; and that the Planter of any Tree or Trees, Hedge or Hedges, already *planted*, and not *reared, grown up*, or that shall hereafter be *planted*, and his Assignee or Assigns, shall have the sole Liberty of *planting and transplanting* such Hedge and Hedges, Tree and Trees, for the Term of 14 Years, to commence from the Day of the first *advertizing* the same and no longer; and that if any other Botanist, Florist, Gardener, Nurseryman, or other person whomsoever, from and after the first Day of April, 1774, within the Times granted and limited by this Act, as aforesaid, shall *plant, transplant, import, cut or break down*, or cause to be *planted, transplanted, imported, cut or broken down*, any such Hedge or Hedges, Tree or Trees, without the Consent of the Proprietor or Proprietors thereof, first had and obtained in writing, signed in the Presence of two or more credible Witnesses; or knowing the same to be so *planted, transplanted, imported, cut or broken down*, without the

Consent



Consent of the Proprietors; shall sell, *advertize* or expose to Sale, or cause to be sold, *advertized*, or exposed to Sale, any such Hedge or Hedges, Tree or Trees, without such Consent, first had and obtained, as aforesaid, then such Offender or Offenders shall forfeit such Hedge or Hedges, Tree or Trees; and all and every Leaf or Leaves, being Part of such Hedge or Hedges, Tree or Trees, to the Proprietor or Proprietors of the Shoots or Branches thereof; who shall forthwith damage and destroy them; and further, that every such Offender shall forfeit one Penny for every Root which shall be found in his, her, or their Custody, either *planted* or *planting*, *advertized*, or exposed to Sale, contrary to this Act: one Moiety, &c."

"II. And whereas many Persons may through Ignorance offend against this Act, unless some Provision be made, whereby the Property in every such Hedge and Tree, as is intended by this Act to be secured to the Proprietor or Proprietors thereof, may be ascertained, as likewise the Consent of such Proprietor or Proprietors, for the *planting* or *transplanting* of such Hedge or Hedges, Tree or Trees, may from Time to Time be known," Be it therefore further enacted, by the Authority aforesaid, that Nothing in this Act contained, shall be construed to extend, to subject any Botanist, Florist, Gardener, Nurseryman, or other Person whomsoever, to the Forfeitures or Penalties, therein mentioned, for or by reason of the *planting* or *transplanting* of any Hedge or Hedges, Tree or Trees, without such Consent, as aforesaid, unless a Sprig or Spray to the Shoots of such Hedge, or Hedges, or a Bud, or Leaf of a Branch of such Tree or Trees, hereafter *advertized*, shall, before such *Advertisement*, be deposited among the natural Curiosities in the BRITISH MUSEUM, and the same be entered in the Registry Book, in such Manner, as hath been usual, which Register Book shall at all Times be kept at the said MUSEUM: and unless such Consent of the Proprietor or Proprietors, be in like Manner entered as aforesaid, for every of which several Entries, Sixpence shall be paid, and no more, which said Register Book may, at all seasonable and convenient Times, be resorted to, and inspected by any Botanist, Florist, Gardener, Nurseryman, or other Person, for the Purposes before mentioned, without any Fee or Reward, and DANIEL CHARLES SOLANDER, Doctor of Physic and of Law, or his Successor in Office, in the said MUSEUM, shall, when and as often as thereunto required, give a Certificate under his Hand, of such Entry or Entries, and for every such Certificate may take a Fee, not exceeding six Pence."

*Sprigs or Sprays of Shoots of Hedges, Buds or Leaves of Branches of Trees, to be deposited before advertising in the Registry Book of the BRITISH MUSEUM.*

*Which may be inspected, at any Time, without Fee.*

*Doctor Solander, &c. to give Certificate of such Entry.*

"III. Provided nevertheless, That if the said DANIEL CHARLES SOLANDER, or his Successor in Office, for the Time being, in the said MUSEUM, shall refuse or neglect to register, or make such Entry or Entries, or to give such Certificate, being thereunto required, by the Planter or Proprietor of such Shoot or Shoots, Branch or Branches, in the Presence of two or more credible Witnesses, that then such Person or Persons, so refusing, Notice being first duly given of such Refusal, by an Advertisement in the Gazette, shall have the like Benefit, as if such Entry or Entries, Certificate or Certificates, had been duly made and given; and that the said DANIEL CHARLES SOLANDER, and his Successors for the Time being, so refusing, shall for any such Offence respectively forfeit, to the Proprietor of such Shoot or Shoots, Branch or Branches, the Sum of £.20 to be recovered, in any of his Majesty's Courts of Record at Westminster, &c."

*Penalty of Refusal.*

"IV. Provided always, and it is hereby enacted, that nine Shoots of each Hedge or Hedges, and nine Branches of each Tree or Trees, that from and after the said first Day of April 1774, shall be *planted* and *advertised*, as aforesaid, or *transplanted* and *advertised*, shall by the Planter and Planters, or Transplanter and Transplanters thereof, be delivered

*After first of April, 1774, nine Shoots of each Hedge, and nine Branches of each Tree, shall be delivered to*



Doctor Solander  
for the Use of  
the Royal Garden,  
&c.

Doctor Solander to  
deliver the Shoots  
and Branches ten  
Days after De-  
mand.

Penalty of Pro-  
prietor, &c. not  
observing the Di-  
rections of this  
Act.

This Act not to  
hinder the Im-  
portation, &c. of  
Hedges or Trees  
planted beyond  
Sea.

This Act not to  
prejudice the  
Right of the Ro-  
yal Family, &c.

After the 14  
years, the Right  
of planting, &c.  
to return to the  
Planter for other  
14 Years.

to the said DANIEL CHARLES SOLANDER, or his Successor, for the Time being, at the said MUSEUM, before such Advertisement be inserted in any public Paper for the Use of the Royal Garden at Kew, the Botanic Garden, belonging to the Company of Apothecaries, at Chelsea, the Garden belonging to JOHN HILL, Doctor in Physic, at BAYSWATER, the Nursery Grounds, at Brompton, Kensington, Turnham Green, Brentford, and Highgate, in the said County of MIDDLESEX, respectively, and for the Use of the Nursery Ground at South Lambeth, in the County of Surry; which said DANIEL CHARLES SOLANDER, and his Successor in the said Office, for the Time being, is hereby required, within ten Days after Demand, by the Keepers of the respective Gardens and Nurseries, or any Person or Persons, by them, or any of them, authorized, to demand the said Shoots and Branches to deliver the same, for the Use of the aforesaid Gardens and Nurseries; and if any Proprietor, Botanist, Florist, Planter, Transplanter, Gardener, or Nurseryman, or the said DANIEL CHARLES SOLANDER, or his Successor, for the Time being, shall not observe the Directions of this Act therein, that then he and they so making Default, in not delivering the said planted Shoots and Branches as aforesaid, shall forfeit, besides the Value of the said planted Shoots and Branches, the Sum of five Pounds for every Shoot or Branch, not so delivered, as also the Value of the said planted Shoot or Branch, not so delivered, the same to be recovered by the Royal Family, the said Company of Apothecaries, the said JOHN HILL, and the Owners or Proprietors of the said Nurseries and Gardens, with their full Costs, respectively."

"V. Provided, that Nothing in this Act contained, do extend, or shall be construed to extend, to prohibit the Importation, vending, or selling of any Hedges or Trees planted beyond the Seas, any Thing in this Act contained to the contrary notwithstanding."

"VI. Provided, that Nothing in this Act contained, shall extend, or be construed to extend, either to prejudice or confirm any Right that the said Royal Family, the Company of Apothecaries, JOHN HILL, or the respective Keepers of the said Nurseries or Gardens, or any of them, or any Person or Persons have, or claim to have, to the planting or transplanting any Hedge or Hedges, Tree or Trees, or Shoot or Branch already planted, or hereafter to be planted."

"VII. Provided always, that after the Expiration of the said Term of 14 years, the sole Right of planting or disposing of Shoots or Branches, shall return to the Planters thereof, if they are then living, for another Term of 14 years."

Now, my Lords, does it not from hence appear that an Act to convert a Perpetuity into a limited Term is absurd upon the Face of it? And may we not from hence conclude that the Booksellers, when they applied for the Act of Queen Anne, knew they had no perpetual Common Law Right?

My Lords, this perpetual Right which they want would, instead of being beneficial to the Interests of Literature, be pernicious to it. It would encourage the Spirit of writing for Money; which is a Disgrace to the Writer, and to his very Age. My Lords, why should not Honour and Reputation be powerful Inducements enough for Authors, without that mean one of Profit? Foreigners know no such exorbitant pecuniary Rewards as have disgraced this Country. The Germans get nothing by writing. The Italian States are so small that no Literary Property can exist, as the Booksellers of one State would immediately print upon those of another.—In France the Sums given to Authors are too small to have this Effect. My Friend, Mr. Hume, has told me that Rousseau assured him he had but fourscore Lewis-

d'ors



d'ors for the Copy of his *Emile*. Such Sums as we hear of in *England*, are merely an Encouragement to the mercenary Spirit of Writing, not to the Merits of it.

But farther, my Lords, if you give this Perpetual Right to publish, you give the same Right to suppress. If an Author is to have this Exclusive Right to his Works after Publication, he may suppress them at will, or at least stop the future Publication of them. My Lords, this is not a mere imaginary Idea; it is possible, and even probable.

My Lords, I shall beg Leave to state a Supposition. Suppose there was a Man (1) who, with the utmost Diligence and Attention, sought into the Records of his Country, and also of foreign ones, for State-Papers to illustrate History; suppose he meet with such Success in this Employment as to make Discoveries of the highest Importance: Suppose, when his Book comes to be published, that instead of receiving that public Applause which he might perhaps have Reason to expect, he, on the contrary, finds himself hunted down for that very Circumstance which ought to have added to his Fame. Supposing there was such a Man, my Lords, must he not be uncommonly firm and resolute to bear up against the illiberal Voice of the Publick? must he not be tempted to suppress a Book, when he found it thus received, notwithstanding the Injury which he would thereby do to, I may say, his Country?

Printers and Bookfellers, my Lords, are not remarkable for too much Modesty; Authors are generally proud, and of so old-fashioned a Turn of thinking, that if a great Man gives them a Promise, they are weak enough to imagine it is to be kept; that Bookfellers are also exceedingly vain, and take every Advantage of Authors which they can, adding their Name to their Cause, merely from Motives of Self Interest: otherwise they would have got Mr. *Addison* to have assisted them with his Influence while he was in Power. A numerous Multiplication of Copies is of late Date; *Shakespeare's* Works have gone through but two Editions of 500 each in two Centuries, and 11000 of *Smollet's* History of England, the worst of the many bad Histories of *England* extant, have been sold in a very short Time; when large Numbers were first printed, the Arts of reviling the Sovereign, abusing the Minister, and libelling every Officer of Government were discovered; Arts happily banished in this quiet Era! *Junius* had an enflamed Imagination, a weak Head, and a worse Heart; in the Cause of *Midwinter*, both Plaintiff and Defendant resembled Fencers with Skates on, treading upon Ice, as they both went farther than they either of them intended; *Alexander Donaldson*, his Client, never printed a Work either within the Time of the Limitation of the 8th of Queen *Ann*, or in the Life-time of the Author; Bookfellers opprobriously term Men who laudably enlarge the Circle of Literature, by giving new Editions of Works of Merit, Pirates; the Reversal of the Decree of the Court of *Chancery*, will rather be of Service to Authors than otherwise; there are now 20000 Printers in London; and in order to convince your Lordships, of the Truth of the Assertion, I beg leave to trouble your Lordships, with a particular Circumstance in Proof thereof. I happened to be upon the Streets when a Lord Mayor two Years since was coming

(1) Sir *John*, we presume, here alludes to his "*Memoirs of Great Britain*," published in 1773, and for the Copy Right of which having received near £1000. he hath, as we are well informed, since the final Decision of this Cause, honourably assigned his reversionary, as well as his original Right, to the Purchaser.



to the House of Commons, to answer for having discharged a City Printer out of the Hands of a Messenger of that House. The Cavalcade was numerous ; but I observed only half the Number of Printers, who usually make up the mob. I asked the Reason of it, and was informed, that ten thousand of them were gone to Tyburn to see a Brother Printer hanged : so that I found they were divided in Opinion, whether they should conduct one Friend to the Gallows, or another Friend to the House of Commons.

### ARGUMENTS of the COUNCIL for the RESPONDENTS.

Mr. Solicitor  
General Wedder-  
burn.

ONE of the learned Pleaders, my Lords, on the other Side of the Question, hath entered into the Argument with great Ability ; his Definition of the Word *Property* is shrewd, metaphysical and subtile ; but I hope to be able to convince your Lordships, that ingeniously as that word hath been defined, it is nevertheless erroneous.

Literary Property, my Lords, hath, by those who have spoke before me, been said to be so abstruse and chimerical, that it is not possible to define it. The Interpretation they have put upon the Word *Property* is, that it implies something corporeal, tangible and material. I beg Leave to differ from this Opinion, and to point out how common it is for Terms to be misapplied, as to their Import.

The Word *Property*, my Lords, hath, by the ablest Writers, been called *Jus utendi, fruendi, disponendi* ; it is therefore evident that any Idea, although it is incorporeal in itself, yet, if it promises future Profit to the Inventor of it, is a Property. And the latter Word hath, through Inaccuracy, been used as describing that, over which a Possessor holds an absolute Reign, Dominion, or Power of Disposal. The subject Matter may be immaterial, and yet liable to be appropriated. Property changes its Nature with its Place : In *England*, Portions of Land are private Property, among the *Arabs* and *Tartars* no such Idea prevails ; they look upon Cattle and Chattels as the only private Property. Among the *Americans*, in certain Districts, Land is considered as Property, but not as the Property of Individuals ; as the Inhabitants live upon the Gains of hunting, a Circumference of Land, sufficient for them to hunt on, is considered as the general Property of one Tribe or Nation.

The Lawyers Mode of describing Property, my Lords, is exceedingly trite and familiar ; they generally divide it into corporeal and incorporeal, and in the present Case it hath been said to commence by Occupation, and continue by Possession. This is a narrow Scale of Argument. In the Courts of Law it is universally admitted, that Matters incorporeal are nevertheless Matters of Property, and the Lawyers Division of it proves that Matters not in Occupancy or Possession, are yet of Value, and can be sold or given over, as in the Cases of Manors and Advowsons, Remainders and Reversions. They can be sold by Assignment, and the Mode of Sale is by Title.

Possession,



Possession, my Lords, is usually described as originating from two Things, Livery and Grant. Under the latter Title, in some Degree, stands Literary Property; but it is not to be considered as originating from Crown Grants, for excepting the prerogative Copies, the Crown has no Right, and in the first of those (the Bible) no farther Right, than in that particular Translation, published in the Reign of King *James the First*.

Every Inventor, my Lords, has a Right to the Profit of his Invention; and as I find that *Grotius* has not escaped the Attorney General's Researches, I am much surpris'd that in his Definition of Property, the learned Pleader hath not hit upon a Position which is directly in Point; for *Grotius* informs us, that *Paulus*, a Roman Lawyer, declared that one Mode of acquiring Property was Invention, and that from the Nature of Things, he who made a Matter, was the Owner of it.

This, my Lords, is a much more liberal Construction of the Word Invention, than hath been put on it by the other Side, who have taken it up in its vulgar Acceptation, and only given it Allusion to Trifles, such as the finding Shells on the Sea-shore, &c.

It hath been contend'd, my Lords, that the Maker of an Orrery is in the same Predicament as an Author, when he publishes. Such Allusion comes not to the Point; the first Sheet of an Edition, as soon as it is given Impression, in a Manner subjects an Author to the Expences of a whole Edition, and if that Edition is 5000 in Number, the Author is not repaid for his Labour and his Hazard, till the last of the 5000 is sold. The Maker of an Orrery is at no other Trouble and Charge, than the Time, Ingenuity and Expence, spent in making one Orrery; and when he has sold that one, he is amply paid. Orrery-making is an Invention, and the Inventor reaps the Profit accruing from it. Writing a Book is an Invention, and some Profit must accrue after Publication; Who shall reap the Benefit of it?

Authors, my Lords, both from Principles of natural Justice, and the Interest of Society, have the best Right to the Profits accruing from a Publication of their own Ideas; and as it hath been admitted on all Hands that an Author hath an Interest or Property in his own Manuscript, previous to Publication, I desire to know who can have a greater Claim to it afterwards? It is an Author's Dominion over his Ideas, that gives him Property in his Manuscript originally, and nothing but a Transfer of that Dominion or Right of Disposal can take it away. It is absurd to imagine that either a Sale, a Loan, or a Gift of a Book, carries with it an implied Right of multiplying Copies; so much Paper and Print is sold, lent or given, and an unlimited Perusal is warranted from such Sale, Loan or Gift: but it cannot be conceived, that when five Shillings is paid for a Book, the Seller means to transfer a Right of gaining one hundred Pounds; every Man must feel the contrary, and confess the Absurdity of such an Argument.

I have in my Hand, my Lords, a Copy of the original Grant of King *James the First* for printing some Poems of his writing, which, excepting the royal Stile in the Beginning, runs in the ordinary Phrase of an Author's Assignment of Copy-right to a Bookseller; nay, indeed, it is more ample, for it not only transfers the Right of the Matter then published, but also transfers a Right to every Thing he should thereafter be pleas'd to write.



*Ames's* Typographical History seems particularly worthy your Lordship's Notice, and also the Application of the Printers in *Prynne's* Time to suppress and call in the Patents for printing and publishing the Bible; the Applicants terming those Patents a Sanction for Monopolizers, the Matter was heard by Council, when *Prynne* pleaded on one Side of the Question, and his Answer turned on nine Points, in one of which that celebrated Lawyer declared, that the most serious and solid Objection against the Printers was, the inherent Common Law Right for an Author to multiply Copies. This is one strong Proof that in the worst of Times the *Jus naturale* respecting Literary Property was not forgot. Licenses in general prove not that Common Law Right did not inherently exist, but were the universal Fetters of the Prefs at the Times in which Authors were obliged to obtain them.

With Regard to the Statute of Queen *Anne*, my Lords, I am very willing to let that rest on the same Grounds the Attorney General hath placed it, viz. that if it gives no Right, it takes none away. But I cannot help observing, that it contains a positive Clause, to let the Matter respecting a Common Law Right, remain precisely in the State in which it was, when that Act passed: and that the Court of *Chancery* considers that such a Right does exist, is evident from the several Injunctions that Court hath granted since the enacting of the Statute, which do not govern those Injunctions, as it doth not particularly specify how the Court of *Chancery* is to act. The Case of *Pope v Curl*; of *Guyne v Doctor Shebbeare*, and the Case of *Lintot & Richardson v Owen* in *Mich. Term*, 1760, before the late Earl *Northington*; this last was a Bill by the Common Law Patentees against a Bookseller for not printing *Cunningham's* Law of Bills of Exchange, &c. at the Law Prefs; when the Chancellor declared the said Book not within the Law Patent. The Case of *Dodsley v Kinnerly*, in 1761, before Sir *Thomas Clark*, Master of the Rolls. The former prayed an Injunction against the latter, for abstracting Part of Dr. *Johnson's* *Rasselas*, and publishing such Abstract in a Magazine. The Case of *Basket & al. v Woodfall & al.* at Lincoln's Inn Hall, after *Hil. Vac.* 1762. this was a Bill by the Statute Law Patentees against the Common Law Patentees for printing the Statutes; when the same Chancellor delivered himself in Favor of the Plaintiffs. These Cases, I mention as so many Instances and Proofs of my last Observations. I entirely agree, my Lords, in Opinion respecting Literary Property, with Sir *Thomas Clarke*, who was a most able Lawyer and upright Judge.

I hope, my Lords, Sir *John Dalrymple's* *Memoirs of Great Britain*, will not be suppressed, as I have Reason to lament its Author intends. I admit it to be true, that *Atticus* employed his Slaves in transcribing, but that even then the Expence was so enormous, that although he was a Man of great Fortune, he was, from a Principle of Oeconomy, under the Necessity of selling his Library; and *Cicero*, who was also a rich Man, was, from the same Principle, unable to purchase it. I therefore earnestly invoke your Lordships to sanctify the final Determination of a Question, founded on natural Justice, and the Interest of Society, by affirming the Decree.

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IT has been very falsely asserted, my Lords, that this Property, before the Act of *Mr. Dunning*, Queen *Anne*, was not to be found at Common Law, and Attempts have been made to prove, that no Cases of it are to be produced; but, my Lords, this is not reasoning to the Purpose; we must consider the Times which we examine, and the Nature of the Property in Question: In Ages wherein Civility had made but small Progress, it would be absurd to look for Litigations of a Property so little valued and so seldom disputed; but, my Lords, the Want of Precedents in such a Case proves nothing against us: there are many unquestionable Common Law Rights, for which you can find no Precedent, so far back as *Richard the Second*. How, my Lords, is it to be supposed, that the Decisions relative to so peculiar a Property, are to be clearly ascertained, through an Age, wherein we have only a dim Light to view Objects, of much greater Importance? Where would be the Equity, if I may so express myself, of our Constitution, if we were to establish it by such remote Precedents? Can any one wonder that we have only a dim View of this Property in Ages when nothing was clear but Injustice and Oppression? The Nature of the Property shews at first Sight, that it would be in vain to look far back, for Decisions in its Favour, even supposing that from other Circumstances the Existence of it was unquestionable.

My Lords, the little Estimation and dubious Circumstances that attended the Copy-right to the *Paradise Lost* of *Milton*, is no Proof against the Existence of a decisive Right. That Poem was so much neglected, that the Bookseller had perhaps as much Reason to complain of his Bargain as the Author. It was the Fault of the Age; and had the same Inattention and want of Taste continued, the Property for which we contend would, perhaps, to this Day have never been litigated; but certainly, my Lords, the Right, in Case of Litigation, would not thereby have been injured.

Attempts, my Lords, have been made to prove that the Establishment of this Right would be injurious to Literature; a strange Assertion surely. It is as much as to say, that rewarding Authors in proportion to their Merit, is the way to discourage their productions; an Argument too weak to make an impression on your Lordships. So very far is this from being the Case, that it is evident the Money given for Copy-Right has increased with the Increase of Security that has been given to the Property. Go back to *Milton's* Time, and from thence advance gradually to Queen *Ann's* Reign, when the Act of fourteen Years Right was one Encouragement to the Booksellers, followed by some considerable Emoluments in their Way to Authors; then, my Lords, reflect on the Progress which has been made since, and permit me to call your Attention on three famous Works, *Mr. Hume's* and *Dr. Robertson's* Histories, and *Dr. Hawkesworth's* Voyages; the Sums given for the Copies of the former, at that Time unparalleled, followed the Security of the Property, which flowed from several Injunctions granted by *Chancery*: and the yet greater Sum given for the latter, followed an actual Determination of the King's-Bench in Favour of this very Property. My Lords, I conceive that whoever reads the Books will not find it possible to account for the Sum in one Case so much exceeding those in the other, unless it be attributed to this Cause; that the Merit of the Voyages is to be classed with that of the Histories, which  
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# ARGUMENTS for RESPONDENTS.

will scarcely be allowed; yet the Copy-Money much exceeded that of the other. In no way is this to be accounted for, but by supposing the Booksellers Liberality to flow from the additional Security, thus given to their Property; and if this is not an Encouragement to Literature, my Lords, I should be glad to be informed what is an Encouragement. It might as reasonably be asserted, that Pensions and Rewards given by a Sovereign to learned Men, did not advance the Interests of Learning.

My Lords, the very Act of Queen *Anne* has been brought to prove, that there could not be a previous Common Law Right in the Copies of Books; but, my Lords, nothing can be more futile than such an Idea: let me illustrate this by a similia case; there passed an (1) Act last Sessions to make Turnips, Potatoes, Cabbages, Parsnips, Pease, and Carrots Property; now, my Lords, might it not be urged with as much Justice, that Turnips and so forth were not Property at common Law? Such an Idea would be ridiculous. Acts may pass to regulate Property, and to inflict Penalties on the Invasion of it, without in the least derogating from the Principles and Foundation of such Property.

We have been farther told, my Lords, that giving the Property of Copies will be giving the Right of Suppression; but this I conceive is a groundless Idea; we are not to suppose that Books of Instruction, Entertainment, or Amusement, will ever be suppressed, and as to Books neither instructive nor entertaining, the sooner they are suppressed the better. Certain, however, it is, that on some Subjects they are read in Proportion to their meriting Neglect.

My Lords, it is to me most extraordinary to admit an Author hath a Property originally in his Composition, and that the first Moment he exercises his Dominion over that Property, and endeavours to raise Profit from it, he loses it. Publication I cannot conceive to be of such a Nature as to destroy that Right to the Matter published, which is acknowledged an Author hath before it is published.

One Part of the Argument, my Lords, used for the Appellants, is that it would benefit Authors, if no exclusive Right of multiplying Copies existed: that is a very strange Assertion, and very extraordinary that Authors in general should think otherwise. It is customary for Booksellers, as Buyers, to buy as cheap as they can, and it is customary for Authors to sell as dear as they can; this cannot be the case if the Moment a Book is published every Man hath a Right to print it.

Authors formerly, my Lords, when there were but few Readers, might get but small Prices for their Labours, but the Books above-mentioned have been paid enormous Sums for, especially the last. If the Purchasers of these Copies have not the sole Right of multiplying Copies, how is the difference to be accounted for? not from any uncommon Generosity in the Booksellers, not from any Superiority in point of Merit in the Books, but from the Idea of a common Law Right prevailing, and from that Idea's being established by the Determination of the Court of *King's-Bench* in the case of *Millar* and *Taylor*; for it is idle to contend that the Subject of the present Appeal is not exactly on the same Grounds.

The Appellants, my Lords, want to sanctify the Importation of *Scotch* Books into *England*, in the same manner as the Importation of *Scotch* Cattle. The Book on which the present Cause is grounded, was written, indeed, by a *Scotchman*, but it was written in *English*, and originally printed in *England*. The Appellants had invaded

(1) 13 Geo. III. Chap. 32.



## THE OPINIONS OF THE JUDGES.

31

invaded the legal Purchaser, by printing a Copy in Scotland, and offering it to Sale in London; I hope, therefore, that your Lordships will teach them that Literary Property is sacred, by affirming the Decree.

The Lord Chancellor put the three following Questions to the Judges, viz.

I. *Whether at Common Law, the Author of any literary Composition had the sole first Right of printing and publishing the same for Sale, and could bring an Action against any Person for publishing the same, without his Consent?* Lord Chancellor put three Questions to the Judges.

II. *If the Author had such Right originally, did the Law take it away upon his printing and publishing the said literary Composition, or might any Person reprint and publish the said literary Composition, for his own Benefit, against the Will of the Author?*

III. *If such Action would have laid at Common Law, is the same taken away by the Statute of Queen Anne? or is an Author precluded by such Statute from any Remedy, except on the Foundation of the said Statute.*

After the above Questions had been twice read, and put to the learned Judges, Lord Camden moved that the two following might also be put, viz.

IV. *Whether the Author of any literary Composition, or his Assigns, had the sole Right of printing and publishing the same in Perpetuity by the Common Law?* Lord Camden moved for two additional Questions, which were also put to the Judges

V. *Whether this Right is any ways impeached, restrained, or taken away by the 8th of Queen Anne?*

They were immediately read by the Lord Chancellor, and put to the Judges accordingly.

## The OPINIONS of the JUDGES.

The Chancellor observed, that "as the learned (1) Judges might entertain dissimilar Opinions upon the Subject, their Lordships Attendance was required to hear the Opinion of each Judge delivered *seriatim*."

Great Pains, my Lords, hath been taken by the ingenious Council for the Respondents, to avoid considering the Subject as at all connected with metaphysic Subtilties; such an Attempt, though highly praise-worthy in those who have the Interest of their Clients at Heart, is, however, totally impracticable, as every Endeavour to disclaim the Use of metaphysic Reasoning, tends only to show how necessary it is to the accurate Discussion of the Subject: The Question, in Fact, is respecting a Right to appropriate Ideas: The Objects over which, a Right and

Mr. Baron Eyre.

(1) N. B. Lord Chief Justice Mansfield delivered no Opinion, but his Lordship's Sentiments may be seen, in Bur. Lit. Prop. 112. &c.



in which an *exclusive Property* is claimed, are incorporeal Existences, which cannot be treated of with any Degree of Accuracy, without having Recourse to the Aid of scientific Disquisition: The *Thinking Faculty*, common to all, should likewise be held common, and no more be deemed subject to exclusive Appropriation, than any other of the common Gifts of Nature.

I am therefore clearly of Opinion, as to the *first Question*, that "*at Common Law, the Author of a literary Composition, hath no Right of printing and publishing the same for Sale,*" which is also an Answer to the *second Question*; for if an Author had no Right at all, *neither he or his Assigns could have any in Perpetuity by the Common Law.* From the very nature of the Contents of a Book, they are incapable of being made Objects of Common Law Property; nothing can be predicated of them, which is predicable of every other Species of Property subject to the Controul, and within the Limits of the Protection of the Common Law. A Right to appropriate Ideas, is a Right to appropriate something so ethereal as to elude Definition; so intellectual as not to fall within the Limits of the human Mind to describe with any tolerable Degree of Accuracy. Ideas, if convertible into Objects of Property, should bear some feint Similitude to other Objects of Property; they do not bear any such Similitude, they are altogether *anomalous*. They cannot pass by Descent to Heirs; they were not liable to Bequest; no characteristic Marks remain whereby to ascertain them; and they are such Incorporealities as not to be subject to any one of the Conditions which constitute the very Essence of Property original or derivative; are such Incorporealities liable to *exclusive appropriation*, by any Right founded in the Common Law.

No Traces, my Lords, of such a Common Law Right are to be found amongst the Greeks or Romans; nor do the municipal Laws of any Country warrant the Supposition of a Right of the Kind existing; yet both Greeks and Romans were careful in arranging every Matter susceptible of Property under its distinct Head.

But here, my Lords, lies another insuperable Difficulty. Admitting ideas liable to exclusive Appropriation, and thus to become Objects of Property; in treating of them as such, how would you class, how arrange them? Would you recount them as simple, complex, combined, or multifarious? as being so many, Species *ejusdem Generis*? or would you resort to Truth and common Sense, and say they are not to be classed, arranged, defined, or ascertained? They are not subject to Alienation, Transmissiion, Grant, or Delivery; and yet they are Objects of Property, to the exclusive Right of appropriating which, Men are clearly entitled by the Common Law, and by every Principle of natural Justice.

For, my Lords, upon a Supposition that Ideas are produced by a thinking Faculty, *common to all Men*, it becomes a Question whether it is consonant to the Principles of natural Justice, to appropriate that to the exclusive Benefit of *one or a few*, which was designed as a common Gift distributed to *all*.

If, my Lords, the Notion of a Common Law Right should be reprobated, such Reprobation carried with it an explicit Answer to the latter Part of the *first* and to the *second Question*: There being no Common Law Right, "*An Author could not bring his Action against any Person for publishing his literary Composition without his Consent.*"

I consider, my Lords, an exclusive Appropriation of Literary Works, a **MONOPOLY**, against every Kind of which the Statute of *James I.* has sufficiently provided.

Even



Even Monopolies, in some Cases, are allowable, but then the State has taken Care to allow them only *for a convenient Time*.

Previous, my Lords, to the Invention of Printing, the Idea of a Common Law Right, has not been suggested; and subsequent to the Invention of this useful Art, so little Notion had Authors of a Right at Common Law to exclusive Appropriation, that before the Institution of the Stationers Company, they had Recourse to the Legislature for a License, Grant, Patent, or Privilege; after the Institution of the Stationers Company the only Mode thought of to secure the Appropriation of a Literary Composition was, by an Entry in the Records of that Company, and the Person in whose Name the Book was entered, let him come by it how he would, was deemed the Proprietor, the Author never being so much as mentioned on these Occasions.

As to the Cases which, my Lords, the Respondents Counsel have adduced to prove the Sentiments of the Court of *Chancery* in Favour of a Common Law Right, it is observable, That although the Court of *Chancery* had frequently granted Injunctions, it cautiously avoided giving any final Adjudication upon the Matter. An *antecedent Common Law Right* was never hinted at; nor were the Injunctions granted in the Cases cited, at all in point; they had been granted on the Appearance of something fraudulent upon the Face of the Transaction; as in the Case of *Pope v. Curl*.

Injunctions, my Lords, do not prove the Chancellor's Opinion upon a Matter of Common Law Right, in Confirmation of which, I will venture an Anecdote. There is a Paper now existing, containing some Notes Lord *Hardwicke* had taken down, which set forth the sole and exclusive Right of an Author at Common Law, to multiply Copies for Sale. In the Margin of which Paper, and opposite to this very Passage, there is in Lord *Hardwicke's* own Hand Writing, a very large Q. which proves that his Lordship entertained Doubts, respecting the Legality of the Position.

The Council, my Lords, for the Respondents, have slipped over the Case of mechanical Inventions; and they are highly commendable for so doing, as they were well aware how strenuously every Argument drawn from the Case of mechanical Inventions would militate against the Interest of their Clients.

Consider, my Lords, a Book precisely upon the same Footing with any other mechanical Invention. In the Case of mechanic Invention, Ideas are in a manner embodied, so as to render them tangible and visible; a Book is no more than a Transcript of Ideas; and, whether Ideas are rendered cognizable to any of the Senses, by the Means of this or that Art, of this or that Contrivance, is altogether immaterial: Yet every mechanical Invention is common, whilst a Book is contended to be the Object of exclusive Property! So that Mr. (1) *Harrison*, after constructing a Time-Piece, at the Expence of Fifty Years Labour, hath no Method of securing an exclusive Property in that Invention, unless by a Grant from the State; yet, if he was in a few Hours to write a Pamphlet, describing the Properties, the Utility and Construction of his Time-Piece, in such Pamphlet he would have a Right secured by Common Law, though the Pamphlet contained

(1) See *ante* Fol. 19. Note 1.



exactly the same Ideas on Paper, that the Time-Piece did in Clock-Work Machinery! The Cloathing is dissimilar; the Essences cloathed are identically the same.

The Exactitude, my Lords, of the Resemblance between a Book and any other mechanical Invention, form various Instances of Agreement. There is the same Identity of Intellectual Substance; the same spiritual Unity. In a mechanic Invention the Corporeation of Parts, the Junction of Powers, tend to produce some one End. A literary Composition is an Assemblage of Ideas so judiciously arranged, as to enforce some one Truth, lay open some one Discovery, or exhibit some one Species of mental Improvement. A mechanic Invention, and a literary Composition, exactly agree in Point of Similarity; the one therefore is no more entitled to be the Object of Common Law Property than the other; and as the Common Law is entirely silent with respect to what is called Literary Property, as antient Usage is against the Supposition of such a Property; and as no exclusive Right of appropriating those other Operations of the Mind, which pass under the Denomination of mechanical Inventions, is vested in the Inventor by Common Law; for these Reasons, I declare myself against the Principle of admitting the Author of a Book, any more than the Inventor of a Piece of Mechanism, to have a Right at Common Law to the exclusive Appropriation and Sale of the same.

I am of Opinion, my Lords, in Answer to the *third* Question, that "*if such Action would have lain at Common Law, the same is taken away by the Statute of Queen Anne; and an Author is precluded by such Statute, from any Remedy, except on the said Statute;*" and in Answer to the *fifth* Question, I am of Opinion, that "*this Right is totally impeached, restrained, and taken away by the 1th of Queen Anne,*" for every Principle of a Common Law Right is effectually exploded, by the Adoption of the Word "*vest*" in the Title, the Words "*taken the Liberty*" in the Preamble, and the Mode of Expression used in the *first* Clause of the Act, of giving an Author an exclusive Property for fourteen Years, *and no longer.*

I know, my Lords, of no Right the Crown has at Common Law to print what are deemed Crown Copies; such exclusive Right originating only from an Exertion of the Prerogative. Before the Invention of Printing it was proper for the Crown to have Copies of the public Acts taken from the Parliamentary Rolls, to transmit to the Sheriffs of the several Counties; and Printing being no more than an expeditious Art of transcribing Copies, the same Power, and for pretty much the same Ends, continues now to be a Part of the Crown's Prerogative; and as the Crown takes Care to have the Statutes printed for the public Promulgation of the Law, so by Virtue of the same Authority, Bibles and Common-prayer Books are printed, and the Copies of them thus multiplied for the Service of Religion, which it becomes the chief Magistrate to protect. But no Common Law Right is vested in the Crown of thus printing and multiplying crown Copies. As to the *second* Question, I am of Opinion,

"*If the Author had such Right originally, that the Law took it away upon his printing and publishing the literary Composition, and that any Person might reprint and publish the said literary Composition, for his own Benefit, against the Will of the Author.*"



The historical Nature, my Lords, of the Case hath been so learnedly and fully agitated in the Hearing of the House, that I shall decline entering into it, and rest my Opinion on general Conclusions, deduced from Principles which arise from fair Argument. Mr. Justice Nares.

I cannot, my Lords, help observing with Mr. Dunning, that, as it is admitted on all Hands that an Author hath a beneficial Interest in his own Manuscript before Publication, it is a most extraordinary Circumstance, that he shall lose that beneficial Interest, the very first Moment he attempts to exercise it.

The Statute, my Lords, does not take away the Common Law Remedy, although it gives an additional one, as in the Case of an (1) Action for maliciously suing out a Commission of Bankruptcy, although the Statutes of Bankruptcy have provided an additional Penalty for that Offence by the Bond given to the Chancellor. I am therefore, my Lords, of Opinion, as to the first Question,

That "at Common Law, the Author of any literary Composition, hath the sole Right of printing and publishing the same for Sale, and may bring an Action against any Person, for publishing the same without his Consent." As to the second Question,

"If the Author had such Right originally, that the Law did not take it away, upon his printing the said literary Composition, and that no Person might reprint and publish the said literary Composition for his own Benefit, against the Will of the Author;" as to the third Question,

"If such Action would have laid at Common Law, the same is not taken away by the Statute of Queen Anne; nor is an Author precluded by such Statute from any Remedy, except on the Foundation of the said Statute;" as to the fourth Question,

That "the Author of any literary Composition, and his Assigns, have the sole Right of printing and publishing the same in PERPETUITY, by the Common Law;" and as to the fifth Question, I am of Opinion,

That "this Right is no ways impeached, restrained, or taken away, by the 8th of Queen Anne."

The Claim of Literary Property, my Lords, is warranted by the Principles of natural Justice and solid Reason. Making an Author's intellectual Ideas common, means only to give the Purchaser an Opportunity of using those Ideas, and profiting by them, while they instruct and entertain him; but I cannot conceive that the Vendor, for the Price of Five Shillings, sells the Purchaser a Right to multiply Copies, and so get Five Hundred Pounds. Mr. Justice Ashurst.

Literary Property, my Lords, is to be defined and described as well as other Matters, which are tangible. Every Thing is Property that is capable of being known or defined, capable of a separate Enjoyment, and of Value to the Owner. Literary Property falls within the Terms of this Definition. According to the Appellants, if a Man lends his Manuscript to his Friend, and his Friend prints it, or if he loses it, and the Finder prints it, yet an Action would lie (as Mr. Justice Yates (2) admitted) which shews that there was a Property beyond the Materials, the Paper and Print. A Man, by publishing his Book, gives

(1) See the Case of *Chapman v. Pickersgill*, in *Wils. Rep. C. B. 145*.

(2) See *Bur. Lit. Prop. 69*.



the Public nothing more than the Use of it. A Man may give the Public a Highway through his Field, and if there is a Mine under that Highway, it is nevertheless his Property. It hath been said, that when the Bird is once out of the Hand, it becomes common, and the Property of whoever catches it; this is not wholly true, for there is a Case upon the Law Books, where a Hawk with Bells about its Neck had flown away; a Person detained it, and an Action was brought at Common Law against the Person who did detain it; a Book, with an Author's Name to it is the Hawk, with the Bells about its Neck, and an Action might be brought against whoever pirated it.

Since the Statute of Monopolies, my Lords, no Questions can exist about mechanical Inventions. Manufactures were at a very low Ebb till Queen *Elizabeth's* Time. In the Reign of *James the First*, the Statute of Monopolies was passed; since that Act no Inventor can maintain an Action without a Patent. The Policy of Kingdoms, and Preservation of Trade, exclude them. The Appellants are contending for the Right of Printing; but the Right of exercising a Trade with another Man's Materials, cannot be allowed, either by Reason, or natural Justice. A Miller may grind Corn, and a Carpenter may build a House; but the first is not warranted in grinding any Corn but his own; nor the Carpenter in building a House with another Man's Wood. The Cases of *Eyre v. Walker*, and *Tonson v. Walker*, happened since the Statute.

With Regard, my Lords, to the Question; Its being capable of Perpetuity, few Subjects are so. Even Land, the most tangible Species of Property, may be washed away by the Sea, and therefore may be rendered incapable of being perpetually enjoyed. I am however of Opinion, that the Respondents are entitled to as full an Enjoyment, as the Nature of the Case will allow.

*As soon as Mr. Justice Ashhurst had concluded his Opinion, he informed the House, that Mr. Justice Blackstone being confined with the Gout, had sent by him his Opinion in writing, which he had desired him to beg Leave of the House to permit him to read, which being granted, he accordingly did. As Mr. Justice (1) Blackstone answered in general Terms the five Questions, in like Manner, as his Brethren Nares and Ashhurst, we decline the Repetition; and for Judge Blackstone's read, presume to substitute his printed Opinion, on this Question of LETTERED (2) Property.*

Mr. Justice  
Blackstone.

" THIS my Lords, is a Species of Property, which, being grounded on Labor and Invention, is more properly reducible to the Head of Occupancy than any other; since the Right of Occupancy itself is supposed by Mr. (3) Locke, and many (4) others, to be founded on the personal Labor of the Occupant; and this is the Right, which an Author may be supposed to have in his own original literary Compositions: so that no other Person, without his Leave, may publish or make Profit of the Copies. When a Man by the Exertion of his rational Powers has produced an original Work, he has clearly a Right to dispose of

(1) It is observable, that the Opinion of this consummate Lawyer, and able Judge, on the two most important Questions, that were ever agitated in this Country, touching constitutional and legal Policy; the one affecting the Right of Election, and the other that of private Property; hath been unanimously exploded, in both Houses of Parliament.

(2) See our Preface.

(3) On Govern. Part 2. Chap. 5.

(4) See 2 Black. Com. Chap. 1. P. 8.

" that



“ that identical Work as he pleases, and any Attempt to take it from him, or vary  
 “ the Disposition he has made of it, is an Invasion of his Right of Property. Now  
 “ the Identity of a literary Composition consists entirely in the *Sentiment* and the  
 “ *Language*; the same Conceptions, cloathed in the same Words, must necessarily  
 “ be the same Composition: and whatever Method be taken of conveying that  
 “ Composition, to the Ear, or to the Eye, of another, by Recital, by Writing, or  
 “ by Printing, in any Number of Copies, at any Period of Time; it is always the  
 “ identical Work of the Author, which is so conveyed; and no other Man can  
 “ have a Right to convey or transfer it, without his Consent, either tacitly or  
 “ expressly given. This Consent may perhaps be tacitly given, when an Author  
 “ permits his Work to be published, without any Reserve of Right, and without  
 “ stamping on it any Marks of Ownership: it is then a Present to the Public, like  
 “ the Building of a Church, or the laying out a new Highway: but in Case of a  
 “ Bargain for a single Impression, or a Sale or Gift of the Copy Right, the Rever-  
 “ sion is plainly continued in the original Proprietor, or the whole Property trans-  
 “ ferred to another.

“ The *Roman Law*, my Lords, adjudged, that if one Man writes any Thing,  
 “ though never so elegantly, on the Paper or Parchment of another, the Writing  
 “ should belong to the original Owner of the Materials, on which it was written (1):  
 “ meaning certainly nothing more thereby, than the more mechanical Operation of  
 “ writing, for which it directed the Scribes to receive a Satisfaction; especially as,  
 “ in Works of Genius and Invention, such as a Picture painted on another Man's  
 “ Canvas, the same (2) Law gave the Canvas to the Painter. We find no other  
 “ Mention in the civil Law of any Property in the Works of the Understanding;  
 “ though the Sale of literary Copies, for the Purposes of Recital or Multiplication,  
 “ is certainly as ancient as the Times of (3) *Terrence*, (4) *Martial*, and (5) *Statius*.  
 “ Neither with us in *England* hath there been any direct Determination upon the  
 “ Right of Authors, at the Common Law; but much may be gathered from the  
 “ frequent Injunctions of the Court of *Chancery*, prohibiting the Invasion of this  
 “ Property: especially, where, either the Injunctions have been (6) *perpetual*, or  
 “ have related to unpublished Manuscripts (6) or to such ancient Books, as were not  
 “ within the Provisions of the Statute of Queen (6) *Anne*. Much may also be  
 “ collected, from the several legislative Recognitions of (7) Copy Rights; and  
 “ from the adjudged Cases at Common Law, wherein the Crown hath been con-  
 “ sidered as invested with certain prerogative (8) Copy Rights; for if the Crown

(1) “ If Titus should write a Poem on History, on your Paper or Parchment, not Titus, but you would be considered as the Owner thereof.” Inst. 2. 1. 33.

(2) Inst. 2. 1. 31.

(3) Proh. in Eunuch. 20.

(4) Epigr. I. 67. IV. 72. XIII. 3. XIV. 194.

(5) Juv. VII. 83.

(6) See Case of Appellants. Fol. 8, 9.

(7) A. D. 1619. Chap. 60. Scobell. 92. 13 & 14 Car. II. Chap. 33. 10 An. Chap. 19.

Sect. 112. 5 Geo. III. Chap. 12. Sect. 26.

(8) Car. Rep. 89. Mod. Rep. 257. 2 Bur. Rep. 661.



" is capable of an exclusive Right, in any one Book, the Subject seems also capable of having the same Right, in another!" 2 Black. Com. Chap. 26. Sect. 8. P. 405, 406, 407. see Bur. Lit. Prop. 13, 68.

Mr. Justice  
Hills.

The Copy Right of Authors, my Lords, is an Estate personal, it is assignable, and every Man conceives what it means; I declare it as my Opinion, that an Author hath an indisputable Power and Dominion over his Manuscript; that this Power is not alienated, when the Manuscript is printed and published; that the Author hath an exclusive Right of multiplying Copies, according to the Common Law, which is founded on Reason and Truth. This Claim of Right began with Printing, and for this especial Reason, because Copies could not be easily multiplied but by the Press; and therefore, that from which no Profit could be got, was hardly a Property.

In the Course of the Arguments, this Claim hath been called by the odious Name of a Monopoly. This is a popular Argument; but *Argumenta ad Populum* are not always well founded; and upon proper Investigation, this appears to be more specious than real.

Copy Right does exist, my Lords, independent of Parents, Privileges, Star-chamber Decrees, or the Statute of Queen Anne. Innumerable Instances occur to prove this; but more particularly the Case of *Tillotson's* Sermons, for the Copy Right of which the Arch-bishop's Family received twenty-five hundred Pounds, after the Expiration of the licensing Act, and previous to the Act of Queen Anne; my Opinion upon the first, second, and fourth Questions, is, that at Common Law an Author hath the sole Right of first printing and publishing the same for Sale, and might bring an Action against any Person who printed, published, and sold the same without his Consent; and likewise that, after Publication, an Author or his Assigns, hath an exclusive Right in Perpetuity of multiplying Copies.

Which Right, my Lords, the Statute of Queen Anne does not take away. It is an Act very inaccurately penned, but nevertheless it conveys to my Mind no Idea of the Legislature's entertaining an Opinion, that at the Time of passing it, there was no Common Law Right; the Word "*vesting*" appearing in the Title hath given rise to such an Idea, but the Preamble contradicts it in the fullest Manner; the Words of it are, "Whereas certain Printers and Booksellers have taken the Liberty of printing and reprinting, &c. &c." the Phraseology of this Sentence plainly proves, that a known Right previous to that Statute, existed; the Legislature would not have termed the Exercise of what was common to all, *taking a Liberty*, had they not understood that a Right in Perpetuity existed at Common Law; the Words of the Preamble to the Bill would probably have been, "Whereas certain Printers and Booksellers claim a Right of printing, &c." And the Intention of the Word *printing* shews that the Idea prevailed that an Author's Property went farther than the first Publication.

The Universality of the saving Clause, my Lords, convinces me that the Right at Common Law, which I have supposed to have existed antecedent to that Act, is left untouched by it. It is not a particular *Salvo* for the Universities, and the Holders of Copy-right by Patent, but it is general, mentioning the Words "*all Persons*."

In



In Answer, my Lords, to the *third* and *fifth* Questions, I am of Opinion, that an Action at Common Law is not any ways impeached, restrained, or taken away by the Statute of *Queen Anne*; nor is the Author precluded by such Statute from any Remedy, except on the Foundation of the said Statute, and the Terms and Conditions prescribed thereby (1).

I beg Leave, my Lords, to read the Sentiments of a learned (2) Judge, in Favour of Literary Property, as reported by an able (3) Lawyer: I agree with the three Judges who have spoke before me, that it is a Property, and that it belongs to an Author independent of any statutory Security. It is not necessary, for any Man to advert either to the *Grecians* or *Romans* to discover the Principles of the Common Law of *England*. Every Country hath some certain general Rules which govern its Law; our Common Law hath its Foundation in private Justice, moral Fitness, and public Convenience; the natural Rights of every Subject are protected by it, and there does not exist an Argument amounting to Conviction, that an Author hath not a natural Right to the Produce of his mental Labor. If this Right originally existed, what but an Act of his own can take it away? By Publication he only exercises his Power over it in one Sense; when one Book is sold it never can be thought that the Purchaser hath possessed himself of that Property which the Author held before he published his Work. A real Abandonment on the Part of the first Owner must take Place, before his original Right becomes common.

In all Abandonments, Judge *Yates* hath defined, my Lords, that two Circumstances are necessary; an actual relinquishing the Possession, and an Intention to relinquish it; in the present Case neither can be proved. Many Manuscripts have not been committed to the Press till Years after they were written, the Possession of them for a Century does not invalidate the Claim of the Author or his Assigns. With Regard to mechanical Instruments, because the Act against Monopolies hath rendered it necessary for the Inventors of them to seek Security under a Patent, it can be no Argument that in Literary Property there should be no Common Law Right. I think it would be more liberal to conclude, that previous to the Monopoly Statute, there existed a Common Law Right, equally to the Inventor of a Machine, as to the Author of a Book.

A Variety of Arguments might be, my Lords, drawn from the Nature of the Property, and the Construction which would rationally be put upon the Act of Publication, but to me they seem superfluous; I am therefore of Opinion in the affirmative, as to the *first*, *second*, and *fourth* Questions.

With Regard to the Statute of *Queen Anne*, my Lords, it is no more than a temporary Security, given by the Legislature to the Author, enabling him to recover Penalties, and bring a Matter of Complaint against any Person who printed upon him to a more certain Issue than by an Action at Common Law. It is an Act passed for the Encouragement of learned Men, and being so termed in its Title, it

(1) See this Judge's Opinion more at large, in *Bur. Lit. Prop.* 9.

(2) Lord *Manfield*, which see in *Bur. Lit. Prop.* 112.

(3) Sir *James Burrow*.



is a sufficient Proof, that it is no Bar to the Common Law Right, which existed previous to its being enacted. It is evident from the wording of it, that it means to give an additional Security to a Right, which they who passed the Act knew existed. Besides, the Manner of passing it is in Favour of this Idea. I have seen the original Bill as presented to the Committee appointed to bring it in, and it then had a long flourishing Preamble, which the Committee struck out. Those who were sanguine for the Petitioners, begged a Perpetuity by Statute. The Enemies to them at first refused to grant any statutory security. The Bill gave particular Trouble in passing; there were several Conferences between the two Houses upon it; and the very Day it passed, it was so backward, that the Queen did not come to the House till three in the Afternoon. Besides, the saving Clause is clearly a *Salvo* to the Common Law Right. The Idea is as forcibly expressed, as Words can desire.

The Injunctions granted by the Court of Chancery, the Multitude of Circumstances deducible in Favour of *Literary Property* from the natural Rights of the Subject, the immediate Nature of the Property, the Idea uniformly entertained of its Existence from the Era of the Commencement of Printing to the present Day; as well as my Construction of the Statute of *Queen Anne*, oblige me in Answer to the *thira* and *fifth* Questions, to declare my Opinion, that an Action at Common Law is not any Ways impeached, restrained, or taken away by the 8th of *Queen Anne*. (1)

Mr. Baron  
Parrot.

The Argument for the Existence of a Common Law Right, and the Definition of *Literary Property*, as chattel Property, is, my Lords, in my Idea exceedingly ill-founded and absurd. If *Literary Property* is a Chattel, then upon the Death of the Possessor of a Manuscript, any simple contract Creditor may oblige his Family or Assigns to give it up, and suffer him to print it. An Author certainly hath a Right to his Manuscript; he may line his Trunk with it, or he may print it. After Publication, any Man may do the same; your Lordships may turn Printers if you chuse, and print it. From the Patents, the Privileges, the Star-chamber Decrees, and the licensing Acts, it is evident that in those Days no Idea was entertained of an Author's having any Claim to the exclusive Right of printing, what he had once published: If a Manuscript is surreptitiously obtained, an Action at Common Law will certainly lie for the corporeal Part of it, the Paper. So if a Friend to whom it is lent, or a Person who finds it, multiplies Copies, having surrendered the original Manuscript, he hath surrendered all that the Author hath any Common Law Right to claim.

The Right under Patents and Privileges was, my Lords, a Right petitioned for by Printers, without any thought of an Author's entertaining an Idea, that he had any Claim. As to the Stationers Company, surely we are not to look for the Common Law among them. All their Rules and Orders are for the Security of such peculiar Works, as their own Members had been wont to print. An Inventor of a Machine or mechanical Instrument, like an Author, gives his Ideas to the Public. Previous to Publication, he possesses the *jus utendi, fruendi, et disponendi*, in as full an Extent

(1) See this Judge's Opinion more at large, in *Bur. Lit. Prop.* 40.



as the Writer of a Book; and yet it never was heard that an Inventor, when he sold one of his Machines, or Instruments, thought the Purchaser, if he chose it, had not a Right to make another after its Model. The Right of exclusively making any Mechanical Invention is taken away from the Author or Inventor by the Act against Monopolies of the 21st of James the First. Which Act saves prerogative Copy Rights, and which would have mentioned what is now termed Literary Property, had an Idea existed that there was a Common Law Right for an Author or his Assigns exclusively to multiply Copies. The Argument, that when a Book is published and sold, there is an implied Contract between the Author and Purchaser cannot be maintained. The Purchaser buys the Paper and Print, the corporeal Part of his Purchase; and he buys a Right to use the Ideas, the incorporeal Part of it.

The Doctrine, my Lords, of implied Contracts will not hold, as it is improbable. The Author sustains a Loss but no Injury, from another's printing his Copy. *Damnum sine injuria* is an established Maxim of Law. As another by multiplying Copies reap Profit, the original Author sustains a Loss, but he sustains no Injury. To be injured a Man must lose his Right; that Right must be founded in Law; and where the Law gives no Remedy, an Author can claim no Right; the Matter is common to all. It hath been said, that a Declaration hath been filed on an Action at Common Law, for the Invasion of Copy Right; but it hath not been found, although every Law book hath been ransacked for the Purpose, that a Trial was ever had at Common Law. An incontrovertible Proof that there is not a Lawyer in Westminster Hall who suppose that there exist any Right at Common Law. The present Claim is neither more nor less than a Claim for a Monopoly, and all Monopolies are odious to the Common Law.

My Lords, the Arguments of the Council, and the Opinions of those on the other Side of the Question are more ingenious than convincing. I answer therefore the First, Second and Fourth Questions in the Negative, being of Opinion that there never existed a Common Law Right, and that an Author hath no Claim to his Manuscript after Publication.

Respecting the Statute of Queen Anne, my Lords, I am perfectly convinced that it is the only Security that Authors or Booksellers have. That it gives a Right for fourteen Years to the Holders of Copies, and after that Period the Right reverts to the Authors for fourteen Years longer. I declare that all the metaphysical Subtlety or Definition which the ablest Logician can muster, cannot give any other Sense to the Words "for the Encouragement of Learning, and for vesting a Right in Authors," in the Title to the Act, than a Creation of a Property, not a further Security for one. The Preamble and express Meaning of every Clause of the Act afford strong Arguments in Favour of the Opinion I am laying down. The Words, "*and no longer,*" are clear and conclusive; out of the Power of Argument to surmount. They shew that the Legislature thought it a great Favour to grant any, even a limited Security, and that they might not be misunderstood, they have expressed their Idea in the fullest Terms. After these Words it is in the highest Degree absurd to contend, that any saving Clause can be so construed as to affect, and indeed destroy the most substantial Meaning of the enacting Part of the Act. The saving Clause is evidently a *Salvo* for those who hold a Patent-right to Copies; and as it would



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would have been tedious to have enumerated all, the Universities are mentioned, as being the greatest Holders under that Kind of Description.

In order, my Lords, to enforce this Observation, and the Conclusion I draw from the Words, *and no longer*, in the enacting Clause, I beg Leave to cite the Case of an Attainder, in the Reign of *Edward* the VIth. being taken off by an Act of Parliament many Years afterwards, which Act, in the enacting Clause, took off the Attainder in the fullest and most entire Manner, and afterwards contained a saving Clause for certain Leases granted by the King, who passed the Bill of Attainder. One of the Holders of the Leases brought an Action against the Family relieved from the Attainder, and grounded his Claim upon the saving Clause; but the Court adjudged against him, for that the Attainder being entirely taken off by the enacting Clause, it was idle to contend that any saving Clause could impeach it, or secure a Right held under the Idea of the Attainder (1).

With regard, my Lords, to the Injunctions cited on the Occasion, the Court of *Chancery* must have uniformly mistaken the Law, if they had not granted them under the Idea of the Statute.

The Act itself, my Lords, gives no more Remedy with its Penalties, than it does without them. An Author in the first Place, is allowed to damask all the Books pirated upon him; by damasking I understand, turn to waste Paper and line Trunks, which Linings are figured like Damask. What remedy is this? none in the world. Then again, a Penny per Book is to be recovered, half of which goes to the Informer and half to the King; here therefore the Author gets nothing. The Statute affords him Grounds for a Remedy in Equity. The Court of *Chancery*, by an Injunction and a Decree, not only stops the Sale of the pirated Copies, but also obliges the Pirate to account for what he hath sold. This is a Satisfaction; this is an actual and an effectual Remedy. To suppose that the saving Clause maintains a Perpetuity of Property, is to suppose that the Act grants an Author fourteen Years *and no longer*, except *for ever*; which is so barefaced, so egregious an Absurdity, that no Man of Sense can be the Dupe of it. That the Court of *Chancery* never dreamt of a Common Law Right, I prove by a Case between the Stamp Office and a News-paper Printer. *Rayner*, a Printer, got into the *Fleet*, and there printed Newspapers without Stamps; the Stamp Office prayed an Injunction, the Court refused it, and told them the Statute having enacted, that a Penalty was to be paid on Conviction, they must prosecute to Conviction under the Statute, and they had a Right to the Penalty, but they could not, upon the Principles of Common Law, prevent the Printer from continuing his Trade. This proves that Statute Laws are unnecessary where Remedies can be had at Common Law.

The Printers who claim the Right of Perpetuity, deserve severe Animadversion, Instances are innumerable, all tending to corroborate any Opinion that there was no Right at Common Law previous to the 8th of *Queen Anne*, and that if there was, that Statute entirely and effectually took it away.

Mr. Justice  
Could,

I agree, my Lords, that an Author hath a Right at Common Law to his Manuscript, previous to Publication. With regard to the Statute of *Queen Anne*, and in answer to the *third* and *fifth* Questions, I conceive the Act entirely takes away any previous Right an Author might have, and that he is precluded thereby

(1) See *Walnglam's Case*, in *Plowd. Com.* 565. and *Allonwoods Case*, in 1 *Co. Rep.* 47. a. .  
from



from any Remedy, except on the Foundation of the said Statute, and the Terms and Conditions prescribed thereby.

The Nature, my Lords, of Patents, Privileges, and Grants of the Crown, re-  
specting Books, have been so very learnedly traced, and that too to a very early Pe-  
riod, and such a Variety of Instances have been cited, all incontestably proving, that  
till of late Years no Idea was entertained, that a Common Law Right existed, respect-  
ing literary Property. For these Reasons I decline entering into a minute Investigation  
of the said Patents: Observing on the Cases, I am clearly of Opinion that, previ-  
ous to the Statute of Queen *Anne*, Authors and Printers had no Security but by  
Patents, and therefore I answer all the Questions in the Negative.

Mr. Baron  
*Adams.*

In answer, my Lords, to the *first*, *second*, and *fourth* Questions, the Cases prove,  
and it is allowed, that Literary Property is Property previous to Publication, and  
that Publication cannot alter it; for that Publication neither makes it a Sale, a Gift,  
a Forfeiture, nor an Abandonment, which are the only Ways that a Person can  
part with his Property. When a Man publishes his Manuscript, he sells to one  
Person only, one Book, and the Use of that one Book, without any Design of  
allowing the Purchaser to multiply Copies: If he gives a Book away, he gives it  
under the same Restrictions; a Forfeiture always implies a Crime, and then the  
Right of Property becomes vested in the Crown; an Abandonment cannot be  
without an Intent of relinquishing his Right; and such Intent is not deducible  
from a Publication of the Ideas written by an Author. In the Case of *Pope v*  
*Curl*, the Letters were the Property of those to whom they were sent; but the  
Ideas remained as Matter of Right vested in the Sender. In the Case of Lord  
*Shaftesbury's* Manuscript, the same Deduction followed; for Mr. *Gwynne* sold to  
*Shebbeare* what he had no Authority from the Author, (Lord *Shaftesbury*) or his  
Assigns, to dispose of. There was no act of Dishonesty on the Part of *Shebbeare*  
although the Manuscript was surreptitiously obtained, and the Family had a  
Remedy.

Ld. Chief Baron  
*Smythe.*

Some Lawyers, my Lords, yet alive, remember the Case of Lord Chief Baron  
*Gilbert's* Manuscripts, which he devised to Baron *Clarke*; the Baron never published  
them, but a Hackney Writer, whom he employed, took an Opportunity of copy-  
ing them, and those stolen Copies were committed to the Press. The same Argu-  
ment lay against pirating after, as before Publication.

It hath, my Lords, been mentioned, that a Man made his landed Estate com-  
mon, by giving a Part of it to the Highway; but it surely will not be con-  
tended, that although he gave a Part of his Estate for such a Purpose, that any  
Person but himself had a Right to the Trees on it, or the Mines beneath it. The  
Arguments in the Case of *Basket* and the University of *Cambridge*, is grounded on  
these Principles. This Case is reported in *Burn's* (1) Ecclesiastical Law, and Sir  
*James* (2) *Burrows's* Reports.

The Cases of *Eyre v Walker*, and others, which have been mentioned, both at  
the Bar, and by the Judges, were all after the *Twenty-one* Years were expired,  
and which, Redress being obtained, speak in Favour of the Common Law Right:

(1.) 8vo. Edit. Vol. I. P. 453.

(2) 2 Bar. Rep. 66.



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and the Case of the Sessions (1) Paper corroborates my Opinion. In order to alarm your Lordship's Passions, two very odious Names have been thrown out, "*Perpetuity*" and *Monopoly*;" neither of which, I think, applies to the present Claim; the first being entirely out of the Question, and the latter Lord Coke has defined to mean a Grant from the Crown, to vend any single Matter.

As to mechanical Inventions, I do not know, my Lords, that previous to the Act of 21 *James I.* an Action would not lie against the Person who pirated an Invention. An Orrery none but an Astronomer can make; and he may fashion a second as soon as he hath seen a first: It is then in a Degree an original Work. Whereas, in multiplying an Author's Copy, his Name as well as his Ideas are stolen, and it is passed upon the World as the Work of the original Author, although he cannot possibly amend any Errors which may have escaped in his first Edition, nor cancel any Part, which subsequent to the first Publication, appears to be improper. In answer, my Lords, to the *first*, *second*, and *fourth* Questions in the Affirmative,

The Statute of Queen *Anne*, my Lords, I consider as a Compromise between Authors and Printers, contending for a Perpetuity, and those who deny them any Statute Right. There are general Rules for the Construction of all Statutes; one is that it shall never be interpreted so as to be unreasonable; another, that no Clause can be construed so as to make it inconsistent with any former Clause; it shall neither be repugnant, nor inconsistent. With regard to this Statute, we must not reject the saving Clause, nor the Motive for which it was made, viz. the Advancement of Learning. The Word *vesting*, if it can be tortured so as to tell against the present Claim, is sufficiently qualified and done away by the Word *secure*, which occurs in the enacting Clause, and which plainly implies a Security for something pre-existing. The Preamble gives full Authority to this Construction, the Word *re-printing* particularly implying a Right after the first Publication; and the word *Purchaser*, (which is one of the Parties mentioned by the Act as being secured in his Property) indicates most amply a previous Right, for Nobody can be thought to purchase what another has not a Right to sell. The Statute affords the Holders of Copy-right a more efficacious Remedy than the Common Law, but it by no Means impeaches, restrains, or takes away the Common Law Right. I therefore answer the *third* and *fifth* Questions in the Negative.

Lord Chief  
Justice De Grey.

With respect to the first Question, my Lords, there can be no Doubt, that an Author has the sole Right to dispose of his Manuscript as he thinks proper; it is his Property, and till he parts with it, he can maintain an Action of Trover, Trespass, or upon the Case against any Man who shall convert that Property to his own Use; but the Right now claimed at the Bar, is not a Title to the Manuscript, but to something, after the Owner has parted with, or published his Manuscript; to some Interest in Right of Authorship, to more than the Materials or Manuscript on which his Thoughts are displayed, which is termed Literary Property, or an exclusive Privilege of multiplying Copies of the Manuscript or Book, which Right is the Subject of the second Question proposed to us.

(1) See the Cause of *Manby & al. v Owen & al.* in *Bur. Lit. Prop.* 33, 123.

Now



Now if there exists any incorporeal Right or Property, my Lords, in the Author detached from his Manuscript, no Act of Publication can destroy it. Can then such Right or Property exist at all? Does such a Right come within the Knowledge or Reach of the Common Law? In answer to the first of these Queries, I acknowledge, though this claim of Property is abstract and ideal, novel and refined, it is yet intelligible, and may as easily be made to exist for ever as for a Term of Years; but in order to know whether it is protected by Law, a preliminary Question is necessary: Whether it has been so determined in its Favour by the great and learned Men who have been my Predecessors in a regular Course of Judicature; it is not for me to shake a respectable series of Decisions, and unhinge the Foundations of an established Right, by any *a priori* Reasoning of my own; but after investigating the Decisions of the Courts of Common Law, I can find no such determinations. What is Common Law now, must have been so three hundred Years ago, when Printing was invented. No Traces of such a Claim are to be met with prior to the Restoration. Very few Cases of this Kind happened in *Charles the Second's* Time, or before the licensing Act, and those few were determined upon the prerogative Right of the Crown. The executive power of the Crown drew after it this prerogative Right, which extended to all Acts of Parliaments, Matters of Religion, and Acts of State. The Case of *Baskett* and the University of *Cambridge*, which was a late one of the same Kind, appeared upon the Pleadings to be a Question arising between two Parties who claimed under concurrent and inconsistent Grants of the Crown. My late honourable and learned Friend (Mr. (1) *Torke*) who argued that Case, endeavoured to shew that his Client's Right might arise from the Power of the Crown, and to illustrate his Argument, said, it might perhaps be "Property founded on Prerogative,"—a Language, however allowable for Council, not very admissible by, or intelligible to a Judge, but the Certificate in the above Cause does not say a Word of Property, and indeed if such a Claim as that had been founded on Property, every one would have as good a Right to publish Abridgments of the Statutes, as of any other Book.

Lord *Northington*, my Lords, granted Injunctions on behalf of Publications which he considered as Matters of State, but left such Works as "The Whole Duty of Man," to their common Remedy at Law. When Works of Literature, encouraged by the Facility of Printing, began to spread, we find the Cases multiply. Of these, however, I lay entirely out of the Question, all those which appear to be Cases between rival Patentees of the Crown; all those relating to the Stationers Company; all those concerning Religion, Law, or the State; and all unpublished Manuscripts.

I shall premise too, my Lords, before I examine the Cases which happened after the Statute, that I am of Opinion, that the Statute gives Authors and their Assigns, a general Right not connected with the Penalty, and that the statutable Right falls under the Protection of a Court of Equity; and may claim the Benefit of an Injunction. To obtain such an Injunction, it is by no means necessary that the Plaintiff should make out a clear indisputable Title. It may be granted on a reasonable

(1) *Ostendent Terris hunc tantum Fata, neque ultra esse sinunt.* Virg.



Pretence, and a doubtful Right, before the Hearing of the Cause; nor is it an Objection that the Party applying for it has a Remedy at Law. No Bill for an Injunction is to be found before the Statute.

The Causes, my Lords, which have come before the Court of *Chancery*, since the Statute, I find to be 17 in Number; of these, eight were founded on the Statute Right: in two or three, the Question was, whether the Book was a fair Abridgement? and all the Rest were Injunctions granted *ex Parte*, upon filing the Bill, with an Affidavit annexed. In these Cases the Defendant is not so much as heard, and can I imagine that so many illustrious Men who presided in the Court of *Chancery*, would, without a single Argument, have determined so great and copious a Question, and which has taken up so much of your Lordships Time? In fact, none of them wished to have it said, he had formed any Opinion on the Subject.

In the famous Case of *Tonson and Walker*, my Lords, of which I have an accurate Note of my own taking, Lord *Hardwicke* said, before the Defendant's Council began to argue, "I am inclined to send a Case to the Judges, for I doubt whether the Matter has been judicially determined; but wish to hear what the Defendant says as to Dr. *Newton's* Notes, however I may determine the general Question, either upon the Common Law or the Statute." The Master afterwards reported the Variations between the two Books to be colourable and illusory only, and therefore the Injunction was made perpetual. Since that Time during the last twenty Years, or more, the main Question has been fluctuating, and in Agitation.

From my own Experience at the Bar, my Lords, I know that the successive Chancellors and Masters of the Rolls, Lord *Northington*, Lord *Camden*, Sir *Thomas Clarke*, &c. have all looked upon the Case as undetermined, it may now therefore be fairly treated as a new Question, and indeed it has been argued as such upon general Principles. Let us consider what Weight those Principles have which are laid down as the Foundation of this new Species of Property; I have heard but of one, namely, that such a Claim is consistent with the moral Fitness of Things. This Idea of moral Fitness is indeed an amiable Principle, and one cannot help wishing all Claims derived from so pure a Source might receive all possible Encouragement; but this Principle is no universal Rule of Law, nor can it be made to apply in all Cases. Beautiful as it may be in Theory, to reduce it into the Practice and Execution of Common Law, would create intollerable Confusion; it would make Laws vain, and Judges arbitrary; nor is it possible to support the Respondents Claim upon these Principles and not allow their Operation, in a Variety of other Cases, where it is confessed on all Hands they cannot be allowed.

Abridgements of Books, my Lords, Translations, Notes, as effectually deprive the original Author of the Fruit of his Labours as direct particular Copies, yet they are allowable. The Composers of Music, the Engravers of Copper Plates, the Inventors of Machines, are all excluded from the Privilege now contended for; but why, if an equitable and moral Right is to be the sole Foundation of it? their Genius, their Study, their Labour, their Originality is as great as an Author's, their Inventions are as much prejudiced by Copyists, and their Claim in my Opinion stands exactly on the same Footing; a nice and subtle Investigation may perhaps find out some little logical or mechanical Differences, but no solid Distinction in the rule of Property that applies to them can be found.—If such a perpetual



perpetual Property remains in an Author, and his Right continues after Publication, I cannot conceive what should hinder him from the full Exercise of that Right in what Manner he pleases; he may set the most extravagant Price he will upon the first Impression, and refuse to print a second when that is sold. If he has an absolute Controul over his Ideas when published, as before, he may recal them, destroy them, extinguish them, and deprive the World of the Use of them ever after; his forbearing to reprint is no Evidence of his Consent to abandon his Property, and leave it as a Derilect to the Public.

But it is said, my Lords, that the Sale of a printed Copy is a qualified or conditional Sale, and that the Purchaser may make all the Uses he pleases of his Book, except that one of re-printing it; but where is the Evidence of this extraordinary Bargain? or where the Analogy of Law to support the Supposition? In all other Cases of Purchase, Payment transfers the whole and absolute Property to the Buyer: there is no Instance where a legal Right is otherwise transferred by Sale, or an Example of such a speculative Right remaining in the Seller; it is a new and metaphysical Refinement upon the Law; and Laws, like some Manufactures, may be drawn so fine as at last to lose their Strength with their Solidity. —When Printing was first introduced, Cardinal *Wolsey* warned King *Henry VIII.* to be cautious how he encouraged it, as a Matter which might be dangerous to the State. The Event however did not prove it so, and therefore the Statute of the 21st of *James I.* excepted it, as a reasonable and allowable Monopoly.

The subsequent licensing Act, my Lords, gave only an adventitious Right; and thus it rested till the Statute of Queen *Anne.* The statute certainly recognizes no Common Law Right, *hinc ille lacrymæ!* Nor can I suppose this Omission happened through Ignorance or Inadvertence, when I see such great Law Names as *Holt, Cooper, Harcourt, Somers, &c.* in the List of that Parliament. This Act adopts the Language of the old Privileges in Terms, 14 Years had been the Term before granted to Inventors, a Specification of the Work too, as in the Case of Machines, was prescribed; nor do I recollect an Instance where a Statute gives such a temporary Remedy as is here granted in Aid of an absolute Common Law Right.

If such a Right, my Lords, existed at Common Law, and it remained unimpeached by that Statute, why that Anxiety in Authors and Booksellers afterwards to obtain another Sanction for their Property? Whence those different Applications to Parliament, in the Year 1735, 1738, 1739, for a longer Term of Years, or for Life in this Kind of Property, and afterwards to get an Act to prohibit the Liberty of printing Books in foreign Kingdoms, and sending them back again? The Truth is, the Idea of a Common Law Right in Perpetuity, was not taken up till after that Failure in procuring a new Statute for an Enlargement of the Term; if (say the Parties concerned) the Legislature will not do it for us, we will do it without their Assistance, and then we begin to hear of this new Doctrine, the Common Law Right, which, upon the whole, I am of Opinion, cannot be supported upon any Rules or Principles of the Common Law of this Kingdom. I therefore, my Lords, answer the *first, third, and fifth* Questions in the Affirmative; and the *second and fourth* in the Negative.

THE



## THE SPEECHES OF THE LORDS.

Lord Camden.

AFTER, my Lords, what the Lord Chief Justice hath so ably enforced, there will be little Occasion for me to trouble your Lordships; nor will the present State of my Health, and the Weakness of my Voice, allow me to exert myself, were I ever so much inclined; but the Nature of my Profession, and the Duty I owe to this House, will not suffer me to remain silent, when so important a Question is to be determined. The fair Ground of the Argument has been very truly stated to you by the Lord Chief Justice; I hope what was Yesterday so learnedly told your Lordships, will remain deeply impressed on your Minds.

The Arguments, my Lords, attempted to be maintained on the Side of the Respondents are founded on Patents, Privileges, Star-chamber Decrees, and the Bye Laws of the Stationers Company; all of them the Effects of the grossest Tyranny and Usurpation; the very last Places in which I should have dreamt of finding the least Trace of the Common Law of this Kingdom: and yet, by a Variety of subtle Reasoning and metaphysical Refinements, have they endeavoured to squeeze out the Spirit of the Common Law from Premises, in which it could not possibly have Existence.

They began, my Lords, with their pretended Precedents and Authorities, which they endeavoured to model in such a Manner, as to extract from them something like a Common Law Principle, upon which their Argument might rest. I shall invert the Order, and first of all lay out of my Way the whole Bede-role of Citations and Precedents which they have produced; that heterogeneous Heap of Rubbish, which is only calculated to confound your Lordships, and mislead the Argument. After the first Invention of Printing, the Art continued free for about fifty Years; I mean to lay no Strefs upon this; I mention it only historically, not argumentatively; for as the Use of it was little known, and not very extensive, its want of Importance might protect it from Invasion; but as soon as its Effects in Politics and Religion were felt, all the crowned Heads in *Europe* at once seized on it, and appropriated it to themselves. Certain it is, that in *England*, the Crown claimed both the Power of licensing what should be printed, and the Monopoly of Printing. Two Licenses were granted to those who petitioned for them. An Author not only was obliged to sue for a Licence to print at all, but he was also obliged to sue for a second Licence that he might print his own Work.

When the King, my Lords, had once claimed the Right of Printing, he secured that Right by Patents and by Charters. Still further to secure his Monopoly, he combined the Printers, and formed them into a Company, then called the Stationers Company, by whose Laws, none but Members could print any Book at all. They assumed Power of Seizure, Confiscation and Imprisonment, and the Decrees of the Star-chamber confirmed their Proceedings. These Transactions, I presume, have no Relation to the Common Law; and when they were established, where could an Author, independent of the Company, print his Works, or try his Right to it? Who could make head against this arbitrary Prerogative, which stifled and suppressed



suppressed the Common Law of the Land? Every Man who printed a Book, no matter how he obtained it, entered his Name in their Books, and became a Member of their Company: then he was complete Owner of the Book. Owner was the Term applied to every Holder of Copies; and the word Author does not occur once in all their Entries. All Societies, good or bad, arbitrary or illegal, must have some Laws to regulate them. When an Author died, his Executors naturally became his successors. The Manner in which the Copy-Right was held, was a kind of Copy-hold Tenure, in which the Owner has a Title by Custom only, at the Will and Pleasure of the Lord. Two sole Titles by which a Man secured his Right was the royal Patent and the License of the Stationers Company; I challenge any Man alive to shew me any other Right or Title; Where is it to be found? some of the learned Judges say the Words *or otherwise* in the Statute of Queen Anne relate to a prior Common Law Right; To what common Law Right could these Words refer? At all the Periods I have mentioned the Common Law Rights were held under the Law of Prerogative. It was the general Opinion that there was no other Right, and the corrupt Judges of the Times submitted to the arbitrary Law of Prerogative. In the Case of the Stationers Company against *Seymour*, all the Judges declared that Printing was under the Direction of the Crown, and that the Court of *King's Bench* could seize all Printers of News, true or false, lawful or illicit. But if it was made Use of to protect Authors, what was this Protection? a Right derived under a Bye Law of a private Company; a Protection similar to that which we give the great *Mogul*; when we want any Grant from him, we talk submissively, and pay him Homage, but it is to serve our own Purpose, and to feast him with a Shadow that we may attain the Substance. In short, the more your Lordships examine the Matter, the more you will find that these Rights are founded upon the Charter of the Stationers Company and the royal Prerogative; but what has this to do with the Common Law Right? for never, my Lords, forget the Import of that Term. Remember always that the Common Law Right now claimed at your Bar is the Right of a private Man to print his Works for ever, independent of the Crown, the Company, and all Mankind. In the Year 1681 we find a Bye Law for the Protection of their own Company and their Copy Rights, which then consisted of all Literature of the Kingdom; for they had contrived to get all the Copies into their own Hands. In a few Years afterwards the Revolution was established, then vanished Prerogative, then all the Bye Laws of the Stationers (1) Company were at an End; every Restraint fell from off the

(1) If (saith *Catherine Macaulay*, a female elegant Writer) all literary Works were, at the Time of the Revolution, in the Hands of the Stationers Company, the Ravages which must have been made on this Property, by a Number of Invaders, were the Property not secured by a supposed common Law Right, would have obliged them before such a Term of Twenty Years were expired, to have had Recourse to the Legislature for a legal Security. The Proprietors of Copy-Right assert, that the Statute of the 8th of Queen Anne was granted on the Principle of facilitating legal Redress. Had it been taken in the Sense of a full Decision in the Case, surely such a Number of Proprietors of old Copies, as now suffer by the present Decision, would not have laid out their Fortunes on such untenable Property; but if it is so very obvious that no Common Law Right exists for securing Copy-Right, surely the granting Injunctions could only tend to deny to one Party, what the Law entitled them to, and to amuse the other to their greater Ruin." See "Modest Plea for Property of Copy Right," P. 12. in Notes.



Press, and the old Common Law of *England* walked at large. During the succeeding (1) fourteen Years, no (1) Action was brought, no Injunction obtained, although no illegal Force prevented it; a strong Proof, that at that Time there was no Idea of a Common Law Claim. So little did they then dream of establishing a Perpetuity in their Copies, that the Holders of them finding no Prerogative Security, no Privilege, no licensing Act, no Star-chamber Decree to protect their Claim, in the Year 1708 came up to Parliament in the Form of Petitioners, with Tears in their Eyes, hopeless and forlorn; they brought with them their Wives and Children to excite Compassion, and induce Parliament to grant them a *statutory* Security. They obtained the Act. And again and again sought for a further legislative Security.

“ Thus, my Lords, stands the Pretence on the Score of Usage, of which your Lordships have heard so much on one Side the Question. I come now to consider upon what Foundation stand the Prerogative Copies; and these were in fact Cases between Co-patentees (for I must consider the Stationers Company itself as a Patentee of the Crown), and no Authorship Right occurs here. The Right in the Crown is supposed to come either from Purchase or Contract; and our Law argues from Principles, Cases, and Analogy; but not a Word of this in the Judgment of the Court; but the Arguments of Council are adduced to prove the point. The Argument of Council is a sorry Kind of Evidence indeed, in most Cases it would be very dangerous to rely on it, but here it is such Stuff as I am ashamed to mention. You have them at length in *Carter*. First, it is put on the Topic of Prerogative, next of Ownership. 1. *Henry the Sixth* brought over the Printers and their Presses, *ergo*, say the Council, he has an absolute Right to the whole Art, and all that it can produce. 2. Printing belongs to Nobody, and what is Nobody's is of course the King's. 3. The King pays his Judges, *ergo*, he purchases that Right for a valuable Consideration. 4. He paid for the Translation of the *Bible*, therefore, forsooth, he bought a Right to sell *Bibles*. Away with such trifling! Mr. *Yorke* put it on its true footing. Ought not the Promulgation of your venerable Codes of Religion and of Law to be intrusted to the executive Power, that they may bear the highest Mark of Authenticity, and neither be impaired, or altered, or mutilated? These printed Acts are Records themselves, are Evidence in a Court of Law, without recurring to the original parliamentary Roll. Will you then give this honourable Right to your Sovereign as such? or will you degrade him into a Bookseller? indeed, had he no other Title to this Distinction, that could hardly be maintained. But if this will not serve the Purpose, recourse is next had to Injunctions; they, it is said, have put the Right out of Doubt: nay, Lord *Hardwicke's* Name is triumphantly brought on the Stage, and he is declared to have absolutely decided the Point: no man, I am sure, can venerate his Name (which will be dear to Posterity as long as Law and Equity remain) more than I do. But this boasted Case, like all the Rest that have been produced, entirely fails in the Proof; and when my Lord Chief Justice *De Grey*, read his own

(1) “ It is to be presumed (says Mrs. *Macaulay*) that, during this Space of Time, there were few or no Inventors, and that this Property, as in other Cases of Property, was for a long Time effectually secured by the Common Sense of the People.” See *Macaul.* Plea. P. 12.



Note of what Lord *Hardwicke* said upon the Occasion, it appeared that Lord *Hardwicke's* Words had been twisted to an opposite Meaning to what he intended. All the Injunction Cases have been ably gone through. I shall only add, in general Terms, that they can prove Nothing: they are commonly obtained for the Purpose of staying Waste, and the Prevention of irreparable Damage. They must therefore in their Nature be sudden and summary, or the Benefit of them would be lost before they were obtained, and they are granted though the Right is not clear, but doubtful. The Question, whether I can maintain my Right against the Devisee or the Heir at Law, may be discussed afterwards at Leisure; but unless upon shewing a reasonable Pretence of Title you in the mean Time tie up the Spoiler's Hands who is selling my Timber, or ploughing my Pasture; my Remedy is gone, or comes too late to prevent the Mischief. What then if a thousand Injunctions had been granted, unless the Chancellor at the Time he granted them had pronounced a solemn Opinion, that they were grounded upon the Common Law? It would only come to this at last, that the Right in Question was claimed on one Side and denied on the other: therefore till the Matter was tried and determined, let the Injunction go. Lord *Hardwicke* after twenty Years Experience, in the last Case of the Kind that came before him, declared that the Point had never yet been determined. Lord *Northington* granted them on the Idea of a doubtful Title; I continued the Practice upon the same Foundation; and so did the present Chancellor. Where then is the Chancellor who has declared *ex Cathedra* that he had decided upon the Common Law Right? Let the Decision be produced in direct Terms. It is amazing that we should have been so long amused with this Kind of Argument, from such vague Authorities!

At length, my Lords, having removed every stumbling Block that opposed our Progress to the pure Source of Common Law; having cleared the Way of all those spurious, pretended Authorities, which will not bear the Test of a moment's serious Examination, the Question begins to assume its natural Shape: Here then I feel myself upon my own Ground, and I challenge any Man to produce any Adjudication, a Precedent, a Case, or any Thing like legal Authority on which this Claim can be grounded. Does there a *Scintilla*, a Glimpse of Common Law appear under any of those different Heads I have mentioned, and which have been so often repeated to us? For my own Part, I find nothing in the whole that favours of Law, except the Term itself, *Literary Property*. They have borrowed one single Word from the Common Law, and have raked into every Store house of literary Lumber to find out how to apply it to the Subject, and to deduce some Principles to which it may refer, and be governed by. And now what are they? What are the Foundations of this Claim in the *English* Common Law? Why, in the first Place, say the Respondents, every Man has a Right to his Ideas.—Most certainly every Man who thinks, has a Right to his Thoughts, while they continue his; but here the Question again returns; when does he part with them? When do they become *publici juris*? While they are in his Brain no one indeed can purloin them; but what if he speaks, and lets them fly out in private or public Discourse? Will he claim the Breath, the Air, the Words in which his Thoughts are cloathed? Where does this fanciful Property begin,



or end, or continue? Oh! say they, the Ideas are marked in black and white, on Paper or Parchment—now, then, we get at something; and an Action, I allow, will lie for Ink and Paper: but what says the Common Law about the incorporeal Ideas, and where does it prescribe a Remedy for the Recovery of them, independent of the Materials to which they are affixed? I see nothing about the Matter in all my Books; nor were I to admit Ideas to be ever so distinguishable and definable, should I therefore infer they must be Matters of private Property, and Objects of the Common Law? But granting this general Position, we get Footing but upon one single Step, and new Doubts and Difficulties arise whenever we attempt to proceed. Is this Property descendible, transferrable, or assignable? When published, can the Purchaser lend his Book to his Friend? Can he let it out for Hire as the Circulating Libraries do? Can he enter it as common Stock in a Literary Club, as is done in the Country? (Every Thing of this Kind, in a Degree, prejudices the Author's Sale of the Impression.) May he transcribe it for a Charity? Then what Part of the Work is exempt from this desultory Claim? Does it lie in the Sentiments, the Language, and Style, or the Paper? If in the Sentiments, or Language, no one can translate or abridge them. *Locke's* Essay might perhaps be put into other Expressions, or newly methodized, and all the original System and Ideas be retained. These Questions shew how the Argument counter-acts itself, how the Subject of it shifts, and becomes public in one Sense, and private in another: and they are all new to the Common Law, which leaves us perfectly in the Dark about their Solution? And how are the Judges, without a Rule or Guide, to determine them when they arise, whose Books and Studies afford no more Light upon the Subject than the common Understandings of the Parties themselves? What Diversity of Judgments! what Confusion in Opinion must they fall into! without a Trace or Line of Law to direct their Determination! What a Code of Law yet remains for their Ingenuity to furnish, and could they all agree in it, it would not be Law at last, but Legislation. But 'tis said that it would be contrary to the Ideas of private Justice, moral Fitness and public Convenience, not to adopt this new System. But who has a Right to decide these new Cases, if there is no other Rule to measure by but moral Fitness and equitable Right? Not the Judges of the Common Law, I am sure. Their Business is to tell the Suitor how the Law stands, not how it ought to be; otherwise each Judge would have a distinct Tribunal in his own Breast, the Decisions of which would be as irregular and uncertain and various, as the Minds and Tempers of Mankind. As it is, we find they do not always agree; but what would it be, if the Rule of Right was always the private Opinion of the Judge, as to the moral Fitness and Convenience of the Claim? Caprice, Self-interest, Vanity would by Turns hold the Scale of Justice, and the Law of Property be indeed most vague and arbitrary (1). That excellent Judge, Lord

(1) This noble Debater on another Occasion thus emphatically defined the Description of a Judge: "It is the Law of Tyrants; it is always unknown; it is different in different Men; it is casual, and depends upon Constitution, Temper, and Passion; in the best, it is oftentimes Caprice; in the worst, it is every Vice, Folly, and Passion, to which human Nature is liable." *Lord Camden's Argument in Hindson and Kersey. 4to. Edit. 1771. "Alteration of Records." 4to. 1769.*



Chief Justice *Lee*, used always to ask the Council, after his Argument was over, "Have you any Case?" I hope Judges will always copy the Example, and never pretend to decide upon a Claim of Property, without attending to the old black Letter of our Law, without founding their Judgment upon some solid written Authority, preserved in their Books, or in judicial Records. In this Case I know there is none such to be produced."

With respect to (1) Inventors, my Lords, I can see no real and capital Difference between them and Authors; their Merit is equal, they are equally Beneficial to Society, or perhaps the Inventor of some of those Master-pieces of Art, which have been mentioned, have there the Advantage. All the Judges who have been of a different Opinion, conscious of the Force of the Objection from the Similarity of the Claim, have told your Lordships they did not know but that an Action would lie for the exclusive Property in a Machine at Common Law, and chose to resort to the Patents. It is indeed extraordinary that they should think so, that a Right that never was heard of, could be supported by an Action, that never yet was brought. If there be such a Right at Common Law, the Crown is an Usurper; but there is no such Right at Common Law, which declares it a Monopoly; no such Action lies; Resort must be had to the Crown in all such Cases. If then there be no Foundation of Right for this Perpetuity by the positive Laws of the Land, it will, I believe, find as little Claim to Encouragement upon public Principles of sound Policy, or good Sense.

If (2) there be any thing in the World, my Lords, common to all Mankind, Science and Learning are in their Nature *publici Juris*, and they ought to be as free and general as Air or Water. They forget their Creator, as well as their Fellow-creatures, who wish to monopolize his noblest Gifts and greatest Benefits. Why did we enter into Society at all, but to enlighten one another's Minds, and im-

(1) Mrs. *Macaulay* observes, that "with the Intention of depriving Authors of the honest, the dear bought Reward of their Literary Labours, they have been levied with the Inventors of a very inferior Order; but supposing the Improvement of the human Mind is not more worthy the Attention of the Legislature than the luxurious, or at least those Conveniences, which are not absolutely necessary to the Ease of common Life, were the Inventor of inferior Order, and the Author to stand upon the same Footing, in regard to Time and other Circumstances, for the Emoluments arising from their different inventive Transactions; the Inventor of inferior Order would find himself much better rewarded than the Authors, for his Ingenuity; for every common Capacity can find out the Use of a Machine. But it is a Length of Time before the Value of a Literary Publication is discovered and acknowledged by the vulgar; and when the Merits of a Work of this kind, in regard to the honest Intention of the Writer, and the Execution of the Composition is in general allowed, the Malice of Party Prejudice, and the Leaven of Selfishness, when it prevails in the Characters of the greater Number of Individuals, may for a long Term of Years keep back the Sale of a Book, which teaches an offensive Doctrine, or tells imaginable Truths to the Public." See *Macaul.* Plea. 17, 18.

(2) Mrs. *Macaulay* "is so far of this noble Lord's Opinion, as to regard with Horror those diabolical Governments, who, by arbitrary Decrees and Punishments, have barred all the Avenues of arriving at Science and Learning from a wretched People, who, to govern like Brutes, they have endeavoured to deprive of the Use of their Reason, which was given by the benevolent Creator, for the Preservation, the Happiness, and the Glory of the Species. But sure if there is any thing, which an Individual can properly call his own, it is acquired Science, and those high Gifts of Genius and Judgment, with which the Almighty has in a peculiar Manner distinguished some of his Creatures; Gifts which, if properly exerted for the Benefit of Mankind, deserve the Respect, the Care, and the Attention of Society." See *Macaul.* Plea, P. 28, 29.

prove



prove our Faculties, for the common Welfare of the Species? Those great Men, those favoured Mortals, those sublime Spirits, who share that Ray of Divinity which we call Genius, are intrusted by Providence with the delegated Power of imparting to their Fellow-creatures that Instruction which Heaven meant for universal Benefit; they must not be Niggards to the World, or hoard up for themselves the common Stock. We know what was the Punishment of him who hid his Talent, and Providence has taken Care that there shall not be wanting the noble Motives and Incentives for Men of Genius to communicate to the World those Truths and Discoveries which are nothing if uncommunicated. Knowledge has no Value or Use for the solitary Owner: To be enjoyed it must be communicated. *Scire tuum nihil est, nisi te scire, hoc sciat alter.* Glory is the Reward of Science, and those who deserve it, scorn all meaner Views; I speak not of the Scribblers for bread, who teize the Press with their wretched Productions; fourteen Years is too long a Privilege for their perishable Trash. It was not for Gain, that (1) Bacon, Newton, Milton, Locke, instructed and delighted the World; it would be unworthy such Men to traffic with a dirty Bookseller for so much as a Sheet of Letter-press. When the Bookseller offered Milton Five Pounds for his Paradise Lost, he did not reject it, and commit his Poem to the Flames, nor did he accept the miserable Pittance as the Reward of his Labor; he knew that the real price of his Work was Immortality, and that Posterity would pay it.

Some Authors, my Lords, are as careless about Profit as others are rapacious of it, and what a Situation would the Public be in with regard to Literature, if there were no Means of compelling a second Impression of a useful Work to be put forth, or wait till a Wife or Children are to be provided for by the Sale of an Edition (2). All our Learning will be locked up in the Hands of the *Tonsons* and the *Lintots* of the Age, who will set what Price upon it their Avarice chuses to demand, till the Public become as much their Slaves, as their own Hackney Compilers are (3).

Instead of Salesmen, the Booksellers of late Years have forestalled the Market, and become Engrossers. If therefore the Monopoly is sanctified by your Lordships Judgement, exorbitant Prices must be the Consequence; for every valuable Author will be as much monopolized by them as *Shakespeare* (4) is at present, whose

(1) Mrs. Macaulay observes, that, "the Names of Bacon, Newton, Milton, and Locke, have been brought into the Arguments, as Examples to prove that the first-rate Gentlemen have laboured in the Literary Way, on the single Motive of delighting and instructing Mankind." See *Macaul. Plea*, P. 18, 19. and see P. 21, 22, 23, 24, and 25, for more Particulars of these great Authors.

(2) Mrs. Macaulay "protests she does not understand the Force of this Objection of the learned Debater, on the Side of the Appellants, for surely neither that benevolent Lord (the same Epithet as given by Mrs. Macaulay in Page 29. to her Creator) or the Public, would wish to have it in their Power to deprive the necessitous Children of an ingenious Man, with whose Literary Labours they had been delighted and instructed, of the just Emoluments arising from those Labours." See *Macaul. Plea* P. 27.

(3) Mrs. Macaulay "protests that she does not understand the Force of this Objection, for that the Public cannot want a second Edition of a Work, before they have bought up the first." See *Macaul. Plea*, P. 27.

(4) Mrs. Macaulay observes, that "the Player *Shakespeare*, it is urged, made a generous Bequest to the Public, of every one of his almost inimitable Productions." See *Macaul. Plea*, P. 19.



Works which he left carelessly behind him in Town, when he retired from it, were surely given to the Public if ever Author's were; but two Prompters or Players behind the Scenes laid hold of them, and the present Proprietors pretend to derive that Copy from them, for which the Author himself never received a Farthing. —

I pass over the flimsy Supposition of an implied Contract between the Bookseller who sells, and the Public which buys the printed Copy; it is a Notion as unmeaning in itself as it is void of a legal Foundation. This Perpetuity now contended for is as odious and as selfish as any other; it deserves as much Reprobation, and become as intolerable. Knowledge and Science are not Things to be bound in such Cobweb Chains; when once the Bird is out of the Cage—*volat irrevocabile*—*Ireland, Scotland, America* will afford her Shelter, and what then becomes of your Action? If the Legislature had intended to make the Right in Question perpetual, they would have taken Care that the Remedy should be so too.

I declare, I made the Decree entirely as of Course, in Pursuance of the Decision upon the Right in the Court of *King's Bench*, and as what I decreed, as a Chancellor, was merely a Step in the Gradation to a final and determinate Issue in the House of Peers, I am totally unbiassed upon the Question, and therefore can speak to it as fairly from my own Sense of it, as any one of the Judges, or any of the Lords present.

Lord Chancellor  
Apsley.

The several Citations and Precedents that have been relied upon at the Bar, are foreign to any Constructions which can support the Respondents in their Argument; the Authorities derived from the Stationers Company are absurd; to quote, among the several extraordinary Entries to be met with in their Books, are the following ones, that one *Sibthorpe* had entered a Book there, "the Title of which," says the Entry, "is to be sent hereafter; and another Member entered the Name of a Book *"about to be translated by him;"* by which all the rest of the World were to be restrained, in the mean time, perhaps for ever, from translating the same. I have in my Hand several Original Letters from *Swift* to *Faulkner* and others, relative to the Statute of *Queen Anne*, all tending to shew the Sense of the Legislature, at the time of passing it, to be against the Right; and both Houses rejected the other Bills afterwards, drawn up chiefly by the Advice of *Dean Swift*, and the Countenance of *Mr. Addison*, which were presented in the same Spirit, and upon the same Grounds; I am therefore clearly of Opinion with the Appellants.

I own I have no great Acquaintance with the Quirks and Quibbles of the Law. I speak to the Matter merely as a Question of Equity; I cannot enter into a delusive, refined, metaphysical Argument about Tangibility, the Materiality, or the Corporeal Substance of Literary Property; it is sufficient for me, that it is allowed such a Property exists. Authors, I presume, will not be denied a free Participation of the common Rights of Mankind, and their Property is surely as sacred, and as deserving of Protection, as that of any other Subjects. It is of infinite Importance to every Country, that the Arts and Sciences should be cultivated and encouraged; where Men of Letters are best protected, the People

Lord Lyttelton.



People in general will be most enlightened, and where the Minds of Men are enlarged, where their Understandings are equally matured in Perception and in Judgment, there the Arts and Sciences will take their Residence. The Arts and Sciences had their Origin in *Italy*; from thence they fled to a remote Corner of *Asia*; at length they returned Companions of the all-conquering Arms of the *Roman Republic*; and at last they were happily seated in this free Country. I am of Opinion, that there are, at present, but two Monarchs in *Europe*, who are the Encouragers of the Arts and Sciences, and are themselves Men of Letters, the King of *Prussia*, and the King of *England*. It hath been urged, that Authors write for Fame only; that Glory is their best Reward, and that Immortality of Renown is an ample Recompence for their Labours; they therefore do not stoop to claim a further Right than that of a first Communication of their Ideas to the Public. This is, in a confined Sense, a proper and a noble Observation, but it will not hold generally. I beg your Lordships to remember, that Genius is peculiar to no Climate, it belongs to no Country, it is more frequently found in the Cottage than the Palace; it rather crawls on the Face of the Earth than soars aloft; when it does mount, its Flight should not be impeded. To damp the Wing of Genius is, in my Mind, highly impolitic, highly reprehensible, nay, somewhat criminal. If Authors are allowed a Perpetuity, it is a lasting Encouragement; making the Right of multiplying Copies a Matter common to all, is like extending the Course of a River so greatly, as finally to dry up its Sources. I am of Opinion, that the Decree should be affirmed.

Bishop of Car-  
lisle.

As the Proceedings, my Lords, in this important Cause have been carried to so great a Length, I should not have presumed to trouble your Lordships with any Thoughts of mine upon the Subject, did I not entertain Hopes of shortening your Lordships farther trouble, by endeavouring to draw your Attention from the many foreign Topics that have been mixed with the present Question: such for Instance as the following: In which of the various Classes of Right or Property, is this contested one to be ranked? Whether it is a Property properly so called, or only a right to some Property? Whether such Property be a corporeal one, or incorporeal? What is the Subject in which it inheres? Whether it lies in the Letters of a Book, or the Ideas, or in both? Whether it be a perfect, an imperfect, or only a *quasi* Right? Whether it is real, or personal, original or derived? Whence it might derive its Origin, and what is its Extent and Duration? How far it is deducible from ancient Practice, or grounded on the Authority of precedents? How it has stood in different Countries, or in our own at different periods, before or after the Art of Printing? and the like.

Speculations of this Kind, however useful on some Occasions, and always entertaining, yet I cannot help esteeming them in a great Measure foreign to the main Point, and am therefore desirous of having all such waved, and your Lordships Deliberation reduced to the present State of that Right under the Direction of our Legislature, which has made, or at least attempted to make, certain express Regulations in it; more particularly that Act in the 8th of Queen *Anne*, which has been so much tortured and perplexed in Arguments offered at your Lordships Bar;



Bar; but a fair Stating and unforc'd Construction of it, I apprehend to be sufficient for deciding the whole Controversy. The Title of the Act runs, "*for the Encouragement of Learning*," and some Clauses in it evidently tend that way, while others have been understood in such a Manner, as must rather occasion its Discouragement, and made to signify either nothing at all, (which is surely one of the greatest Absurdities in the Interpretation of any Law) or to imply something repugnant to its avowed Intent, by putting Affairs into a worse Condition than they were in before the Commencement of this favourable Act; nay worse than others are those who decline the Acceptance of its Benefits, while attended with all those Clogs and Limitations, which are too well known to need a particular Detail. The Method there adopted for this Encouragement of Learning, was, we find, very maturely digested in several Conferences between the two Houses, and at last declared to be (not by securing any original Copy Right, as was proposed by those Booksellers who promoted the Bill; but) by vesting Copies of printed Books in the Authors or Purchasers of such Copies, during the Time therein mentioned, and no longer.—How far this deliberate Alteration of the Phrase may be deemed a material one, and whether insisting on the two distinct Significations of these Terms, *Vesting* and *Securing* as here circumstanced, though they may be elsewhere used promiscuously; Whether the taking notice of that remarkable Attention in our Law makers to the wording of this Act may not amount to something more than a trifling verbal Criticism? whether this vesting of a Right in Authors is merely additional and accumulative, or does not imply a creative Influence *de novo*, an actual Constitution of such a plenary Right, as had only an ideal Pre-existence without it?—these Points must be submitted to your Lordships.

I shall here only take the Liberty to repeat what has been observed on a subsequent Statute of the 10th of Queen (1) *Anne*, concerning Stamp Duties laid on Pamphlets, which by expressly referring to this before us, and explaining the Nature both of that Copy Right which springs from it, and of those others that may be drawn from different Sources, seems to put the Intention of both these Acts out of Question. The Penalty of a Default here is extended to the Annihilation of all Copy-Rights whatsoever, in these words: "Then the Author, Printer, and Publisher, of such Pamphlet shall loose all Property therein, and in every Copy thereof, although the Title thereto were registered in the Book of the Stationers in London, according to the late Act of Parliament in that behalf, so as any Person may freely print and publish the same, without being liable to any Action or Prosecution for so doing; *any thing in the said Act of Parliament for vesting Copies of printed Books in the Authors; or in any Bye Law contained; or any custom, or other thing to the contrary notwithstanding.*" I must leave it to your Lordships Consideration whether that Common Law Right, if it arises either from *Custom* or *any other thing*, be not here manifestly included.

"To return to the former Statute. After the Creation then, or Establishment of such an exclusive Right as is conferred upon Authors in the Body of this Act, there comes a *Proviso*, that *nothing in the said Act shall be construed to extend, either*

(1) 10 *An.* Chap. 19. Sect. 112.



## T H E S P E E C H E S

to prejudice or confirm any Right that the Universities or any Persons have or claim to have—i. e. (according to the most natural Construction of these Words) any persons holding in or under the said Universities, or claiming any Privilege of the same Kind, and on the same Ground with that of the Universities, i. e. some positive one given or granted by special Licence or Letters Patent, by Statute or Charter, as their's evidently is; and all others under the Consideration of these Law-makers are understood to be:—whereas if this Proviso were taken in so lax and indeterminate a Sense as to include any other Persons, setting up any Claim on other Grounds, it will admit every Body; and consequently its restrictive Clauses are reduced to a mere Nullity.

“Neither is the Observation drawn from the Preamble of this Act to be wholly admitted, nay that the apparently soft Terms applied to those several Persons who had of late taken the Liberty to print Books without the Consent of their respective Authors—that these gentle Terms (so unusual in penal Statutes) would scarcely have been used on this Occasion if such a Practice as was then and there laid under certain Restraints, as designed to be branded was antecedently, or absolutely criminal. But if so great Advantage is taken from a general Mention in the Proviso, of Persons and Rights, not there sufficiently described, as to afford Room for maintaining the forementioned Absurdity; if the said Act proves to be so inaccurate and defective, (as in Truth it is extremely defective, with regard to the Penalties annexed; the Time of suing for them, the Method of securing their Copies to the Universities, and other Particulars too notorious to need enlarging upon in this Place) I beg Leave to suggest an Enquiry to your Lordships, (though the Matter does not immediately fall under your present Consideration) whether it be not high Time to have this faulty Act amended:—let it be revised as soon as possible rather than suffered to be under so many Imperfections as can serve only to ensnare Numbers who are acting on the most obvious Sense, and supposed Validity of it, to their Ruin; and either mislead others in the Interpretation of some essential Parts of it; or make the whole useless, and a dead Letter.—

However, so long as this same Act does keep its Ground, it must be considered as standing on Principles directly opposite to the Notion of any abstract independent perpetual Copy-right; which Right, whatever it were supposed to be originally, is now plainly circumscribed and subjected to certain Restrictions; provided always that the said Act be really capable of affecting it in any Respect, which some Persons seem to doubt of, and others, (if I mistake not) have gone so far as to deny:—and if it once comes to be an established Maxim, that Acts of Parliament can have no Effect on Claims subsisting at Common Law; in vain surely does the Legislature employ itself in framing any concerning them.—But as this is not yet clearly admitted to be the Case, even with the Act before us, which is allowed to be in Force, whatever that Force may be—so long as ever it exists, it must exclude all that Right paramount and inextinguishable, which is exhibited along with it; which being dressed up at Pleasure, has made its Appearance under so many questionable Shapes, and been so warmly espoused under every of them; but yet after all the Pains taken with it, is still, I humbly conceive, of too delusory and unsubstantial a Nature to be laid hold of by common Appre.



Apprehensions—too vague and intricate to be perfectly and unanimously ascertained even by the most learned Sages of the Law; and too feeble to be safely relied on, either for promoting the general Service of the Public, or for supporting any true, valuable Interests of Literature in particular.”

I speak, my Lords, to the Question merely as likely to affect the Liberty of the Press. I think the confining the Right of multiplying Copies to the Author and his Assigns, may prove dangerous to the constitutional Rights of the People, and I justify this Idea by declaring that the Press is the sole Controller of the Actions of Princes and Ministers; that if a despotic Measure is adopted by either, the Freedom of the Press will be properly and efficaciously exerted in informing the People and rousing a Spirit of Resistance. I would suppose on this Ground of my Argument that upon the Occurrence of some very unconstitutional and despotic Measure, a Pamphlet properly describing the Matter was published, and that the (1) Minister bought up the Impression and Copy Right, thereby choaking the Channel of public Information, and securing in his Closet the Secret which might prevent the Loss of Freedom to the Subject. I am satisfied in myself, that the Liberty of the Press is of such infinite Consequence in this Country, that if the Constitution was over-turned, and the People enslaved, grant me but a free Press and I will undertake to restore the one and redeem the other. I am therefore for reversing the Decree; and,

Lord Effingham  
Howard.

*The DECREE of the Court of CHANCERY, was accordingly reversed.*

(1) Mrs. Macaulay, says, it would be a difficult Task, even in this Country, for a Minister to divert out of the necessary Channel of Corruption, a Sum sufficient to bribe an Individual, who would always have it in his Power to repeat his extortionate Demands, but supposing a Minister should stand so much in Awe of the Doctrine and Reflections of any particular Author, as to expend large Sums and Emoluments to suppress them, and that he had the Money at Command, he would find it all thrown away in an impossible Attempt; for the Public might have Recourse to the *Irish*, and the *Americans*, who would furnish them with as many Editions of the Author, as they pleased. See Macaul. P. 36. 37.



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APPENDIX



# A P P E N D I X.

As the Statute of 8 ANNE, Chap. XIX. Entituled,  
*"An Act for the Encouragement of Learning, by  
 vesting the Copies of printed Books, in the Authors  
 or Purchasers of such Copies, during the Times  
 therein mentioned;"* hath been so often referred to  
 by the Council, Judges, and Lords, in the above  
 Arguments, Opinions and Speeches, it was thought  
 proper to subjoin an Abstract of it.

**PREAMBLE.** WHEREAS Printers, Booksellers, and other Persons have of late frequently  
 taken the Liberty of printing, reprinting and publishing, or causing to  
 be printed, reprinted and published, Books and other Writings, without  
 the Consent of the Authors or Proprietors of such Books and Writings, to their  
 very great Detriment, and too often to the Ruin of them, and their Families :  
 For preventing therefore such Practices for the future, and for the Encourage-  
 ment of learned Men to compose and write useful Books ; it is enacted, That  
 after 10 April, One Thousand Seven Hundred and Ten, the Author of any Book  
 already printed, who hath not transferred to any other the Copies or Shares thereof ;  
 or the Bookseller, Printer and other Person, who hath purchased or acquired the  
 Copies of any Book, in order to print or reprint the same, shall have the sole  
 Right and Liberty of printing such Book, for twenty-one Years, to commence from  
 the said tenth Day of April, and no longer ; And the Author of any Book already  
 composed, and not printed and published, or that shall hereafter be composed,  
 and his Assignee or Assigns, shall have the like Right and Liberty for fourteen  
 Years, to commence from the Day of the first publishing the same, and no  
 longer ; And if any other Bookseller, Printer, or other Person from and after  
 said tenth Day of April, within the Times hereby limited as aforesaid, shall  
 print, reprint, or import, or cause to be printed, &c. any such Book without  
 the Consent of the Proprietor first had and obtained in Writing, signed in the  
 Presence of two Witnesses, or knowing the same to be so printed, or reprinted,  
 without such Consent shall sell, publish, or expose to Sale, or cause to be sold,  
 &c. any such Book, without such Consent first had and obtained, as aforesaid,  
 then such Offender shall forfeit such Book, and every Sheet thereof to the Proprietor,  
 who shall forthwith damask (1), and make waste Paper of them : And every such

After 10 April,  
 1710, the Au-  
 thors of Books  
 already printed,  
 who have not  
 transferred their  
 Rights, and the  
 Booksellers, &c.  
 who have pur-  
 chased Copies,  
 shall have the  
 sole Right of  
 printing them,  
 for the Term of  
 21 Years: And  
 the Authors of  
 Books not print-  
 ed, to have the  
 sole Right of  
 printing for four-  
 teen Years.

(1) See Mr. Baron Perrott's Opinion. Fol. 42.

Offender



# A P P E N D I X.

**Punishment of Bookseller, &c. printing without Consent of the Proprietor.** Offender shall also forfeit one Penny for every Sheet, in his Custody, either printed or printing, published, or exposed to Sale, contrary hereto; one Moiety thereof to the Queen, the other Moiety to any Person suing for the same, to be recovered in any Court of Record, by Action of Debt, Bill, Complaint, or Information, in which no Wager of Law, Effoin, Privilege, or Protection, or more than one Imparlance shall be allowed.

**Copies of Books to be entered before Publication in the Register Book of the Company of Stationers. Which may be inspected at any Time without Fee. Clerk of the Company to give a Certificate of such Entry.** "SECT. II. Nothing herein contained shall be construed to extend to subject any Bookseller, &c. to Forfeitures or Penalties, for printing or reprinting of any Book without such Consent, as aforesaid, unless the Title to the Copy thereof hereafter published shall, before such Publication, be entered, in the Register Book of the Company of Stationers, as hath been usual; which Book shall be kept at the Hall of the said Company, and unless such Consent be entered as aforesaid, for which Entry, Sixpence only shall be paid; which Book may be inspected by any Bookseller, &c. without Fee; and the Clerk of the said Company, shall, when required, give a Certificate under his Hand of such Entry, for which he may take Sixpence."

**Penalty of the Clerk refusing to do.** "SECT. III. If the Clerk shall refuse or neglect to make such Entry, or to give such Certificate, being required by the Author or Proprietor, in the Presence of two Witnesses, then such Person so (1) *refusing*, Notice being given thereof, in the *Gazette*, shall have the like Benefit, as if such Entry and Certificate had been duly made and given, and the Clerks so refusing, shall forfeit to the Proprietor of such Copy twenty Pounds, to be recovered [as mentioned in Sect. I.]"

**After 10 April, nine Copies of each Book shall be delivered to the Warehouse-keeper of the Company of Stationers, for the Use of the University Libraries, &c. Warehouse-keeper to deliver the Books 10 Days after Demand. Penalty of Proprietor, &c. not observing the Directions of this Act.** "SECT. V. Nine Copies upon the best Paper, shall, by the Printer, be delivered to the Warehouse-keeper of the said Company, at their Hall, before Publication, for the Use of the Royal Library, the Libraries of the Universities of *Oxford* and *Cambridge*; of the four Universities in *Scotland*, of *Sion College*, in *London*; and the Library belonging to the Faculty of Advocates at *Edinburgh* respectively; by the said Warehouse-keeper, within ten Days after Demand by any Person authorized, to deliver the same; and if any Proprietor, Bookseller, or Printer, or the said Warehouse-keeper, shall not observe these Directions; he shall forfeit, besides the Value of the said printed Copies, five Pounds for every Copy not so delivered, as also the Value of the said printed Copy not so delivered, the same to be recovered by the Queen, the Chancellor, Masters, and Scholars of any of the said Universities, and by the President and Fellows of *Sion College*, and the said Faculty of Advocates at *Edinburgh*, with their full Costs respectively."

**Penalties in Scotland how recoverable.** "SECT. VI. If any Person incurs the Penalties in *Scotland*, they shall be recoverable by Action before the Court of Session."

**This Act not to hinder the Importation, &c. of Books in Greek, &c. printed beyond Sea.** "SECT. VII. Not to prohibit the Importation, vending, or selling of any Books in Greek, Latin or any other foreign Language printed beyond the Seas."

**General Issue.** "SECT. VIII. If any Action or Suit shall be commenced against any Person, for doing or causing to be done any Thing in Pursuance of this Act, the Defendants may plead the General Issue, and give the special Matter in Evidence; and if upon such Action a Verdict be given for the Defendant, or the Plaintiff become nonsuited, or discontinue his Action, Defendant shall have his full Costs, with same Remedy as a Defendant by Law hath."

(1) This Part of the Act seems very erroneous, for *refusing* ought to be *refused*, to make the Sense and Meaning, as intended by the Legislature.



## A P P E N D I X.

“SECT. IX. Not to prejudice or confirm any Right said Universities, or any of them, or any Person have, or claim to have, to the printing or reprinting any Book or Copy already printed, or hereafter to be printed.”

*This Act shall not prejudice the Right of the Universities.*

“SECT. X. All Actions, Suits, Bills, Indictments, or Informations for any Offence that shall be committed against this Act, shall be brought sued, and commenced within three Months next after such Offence committed.”

*Actions for Offences against this Act, to be brought in three Months.*

“SECT. XI. After the Expiration of said fourteen Years, the sole Right of printing or disposing of Copies shall return to the Authors thereof, if they are then living, for another Term of fourteen Years.”

*After the 14 Years, the Right of printing, &c. to return to the Author for other 14 Years.*

### Lord KAMES's Opinion of the Act.

Lord Kames “knows no Monopoly, that in sound Politics can be justified, except that given to Authors of Books for 14 Years, by an Act of Queen Anne, judiciously contrived, not only for the Benefit of Authors, but for that of Learning in general; for it encourages Men of Genius to write, and multiplies Books both of Instruction and Amusement; which, by Concurrence of many Editors, after the Monopoly is at an end, are sold at the cheapest Rate; many well disposed Persons complain, that the exclusive Privilege bestowed by the Statute upon Authors, is too short, and that it ought to be perpetual; nay it is asserted, that Authors have a perpetual Privilege by Common Law; and it was determined (1) lately in the Court of King's (2) Bench, that by the Common Law of England, the Privilege is perpetual. Nothing more frequently happens, than by grasping at the Shadow to lose the Substance; for Lord Kames has no difficulty to maintain, that a perpetual Monopoly of Books would prove more destructive to Learning, and even to Authors, than a second Irruption of Goths and Vandals; it is the Nature of a Monopoly to raise the Price of Commodities, and by a perpetual Monopoly, in the Commerce of Books, the Price of good Books would be raised far beyond the Reach of most Readers: they would be sold like the Pictures of great Masters; the Works of *Shakespeare*, for Example, or of *Milton*, would be seen in very few Libraries; in short, the Sale of good Books would be confined to a few learned Men, such as have Money to spare, and to a few rich Men, who buy out of Vanity, as they buy a Diamond, or a fine Coat. Fashions at the same Time are variable, and Books, even the most splendid, would wear out of Fashion, with Men of Opulence, and be despised, as antiquated Furniture: and with Respect to Men of Taste, their Number is so small, as not to afford Encouragement, even for the most frugal Edition. Thus Booksellers, by grasping too much, would put an End to their Trade altogether; and Men of Genius would not write, when no Price could be afforded for their Works. At the same Time, our present Authors and Booksellers would not be much benefited by such a Monopoly; not many Books have so long a Run as 14 Years; and the Success of a Book, on the first Publication, is so uncertain, that a Bookseller will give little more for a Perpetuity, than for the temporary Privilege of the Statute: this was foreseen by the Legislature, and the Privilege was wisely confined to 14 Years, equally beneficial to the Public, and to Authors.” See Lord Kames's Sketches of the History of Man. Vol. I. B. 2. Sketch VIII. Sect. 7. Page 500. and his Lordships Argument, on giving his Opinion, upon the Question of Literary Property, between *Hinton* and *Donaldson, et al.* in *Boswell's Scottish* Decision of the Court of Session, in that Cause.

*Perpetual Monopoly of Books destructive to Learning and Authors.*

*And would put an End to the Bookselling Trade.*

(1) See *Bur. Lit. Prop.* 4<sup>to</sup>. 1773.

(2) In the Cause of *Millar v. Taylor*.



